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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-265

THE COMMONWEALTH OF MASSACHUSETTS ET AL.,
APPELLANTS,

v.

HELEN B. FEENEY,
APPELLEE.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Jurisdictional Statement

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No.

THE COMMONWEALTH OF MASSACHUSETTS ET AL.,
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HELEN B. FEENEY,
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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Jurisdictional Statement

The Attorney General of the Commonwealth of Massachusetts, acting pursuant to the provisions of Mass. Gen. Laws c. 12, § 3, and to resolutions passed by both branches of the Massachusetts General Court, submits this statement in support of the contention that the final order of the United States District Court for the District of Massachusetts should be summarily reversed or, in the alternative, that probable jurisdiction should be noted. This statement is submitted in accordance with the provisions of Rule 15, Rules of the Supreme Court of the United States, on behalf of the Person-

nel Administrator of the Commonwealth and the Massachusetts Civil Service Commission.[1]

The appellants seek a reversal of a decision of the district court invalidating Mass. Gen. Laws c. 31, § 23. The appellants contend that the decision of the district court is inconsistent with the opinion of this Court in *Washington* v. *Davis*, 44 U.S.L.W. 4789 (U.S. June 7, 1976), and should be summarily reversed. In the alternative, the appellants submit that the decision of the district court was based on the application of an incorrect standard of review and that the decision raises a substantial question requiring plenary consideration by this Court.

Opinion Below

The opinion of the district court dated March 29, 1976, is unreported. The opinions, judgment and order of the district court are reproduced as an appendix to this statement (App. A).

Jurisdiction

The present appeal is from a final order of a three-judge court of the United States District Court for the District of Massachusetts, convened pursuant to 28 U.S.C. §§ 2281 and 2284, upon the application for a permanent injunction to restrain the enforcement, operation and execution of a statute

[1] Appellants have retained the original caption of the case below for ease of identification even though the parties and their designations have changed. *See* Statement of the Case, *infra*, p. 6 (Commonwealth of Massachusetts and Division of Civil Service dismissed as parties), and n. 3, *infra* (designation of Director of Civil Service changed).

of the Commonwealth of Massachusetts. In the court below, plaintiff-appellee, Helen B. Feeney, sought an injunction and a declaratory judgment pursuant to 28 U.S.C. §§ 1331, 1343(3); 42 U.S.C. § 1983; and 28 U.S.C. § 2201, claiming that the Massachusetts statute granting veterans preference in civil service employment, Mass. Gen. Laws c. 31, § 23, deprives women of equal consideration for public employment in violation of the Fourteenth Amendment.

On March 29, 1976, the district court entered its judgment and order together with its opinion, declaring that the veterans' preference statute had the effect of excluding female applicants from the civil service system and was, therefore, unconstitutional. The order enjoined the defendants from enforcing the provisions of the statute. A notice of appeal was filed with the district court on May 25, 1976. A copy of that notice is reproduced as an appendix to this statement (App. B).

Jurisdiction of this Court is conferred by 28 U.S.C. § 1253. Cases believed to sustain jurisdiction are: *Massachusetts Board of Retirement* v. *Murgia*, 44 U.S.L.W. 5077 (U.S. June 25, 1976); *United States* v. *Georgia Public Service Commission*, 371 U.S. 285 (1963); *Paul* v. *United States*, 371 U.S. 245 (1963); *Florida Lime and Avocado Growers* v. *Jacobsen*, 362 U.S. 73 (1960).

Statute Involved

Although the suits filed in district court challenged Mass. Gen. Laws c. 31, §§ 21-25, only § 23 was found to be unconstitutional and it is the sole Massachusetts statute directly

before this Court on appeal. At the time of the district court opinion[2] Mass. Gen. Laws c. 31, § 23, provided:

> The names of persons who pass examinations for appointment to any position classified under the civil service shall be placed upon the eligible lists in the following order: —
>
> (1) Disabled veterans as defined in section twenty-three A, in the order of their respective standing; (2) veterans in the order of their respective standing; (3) persons described in section twenty-three B in the order of their respective standing; (4) other applicants in the order of their respective standing. Upon receipt of a requisition, names shall be certified from such lists according to the method of certification prescribed by the civil service rules. A disabled veteran shall be retained in employment in preference to all other persons, including veterans.

Question Presented

Does the preference afforded veterans by Mass. Gen. Laws c. 31, § 23, violate the Equal Protection Clause of the Fourteenth Amendment?

[2] On June 24, 1976, the Governor of the Commonwealth signed into effect a statute establishing in interim veterans' preference statute which would operate only during the pendency of this appeal. Mass. St. 1976, c. 200. The new statute is set out as an appendix to this statement (App. C).

Statement of the Case

On November 4, 1974, Carol A. Anthony filed a civil complaint in the United States District Court for the District of Massachusetts, seeking to enjoin the enforcement of Mass. Gen. Laws c. 31, §§ 21-25.[3] The complaint was accompanied by an application for a temporary restraining order and an application to convene a three-judge district court pursuant to 28 U.S.C. §§ 2281 and 2284. A temporary restraining order was granted on November 4, 1974, and the application for a three-judge court was granted four days later.

The gravamen of the complaint was that the veterans' preference statute deprived the plaintiff of equal protection of the laws because it operated to exclude women from public employment and perpetuated the effect of sex discrimination established by federal regulation concerning military service. On May 19, 1975, the complaint was amended to include as additional plaintiffs Betty A. Gittes and Kathryn Noonan, who, like Ms. Anthony, were female non-veterans seeking employment as attorneys under the job description "Counsel I."

On May 20, 1975, Helen B. Feeney filed a complaint against the same defendants raising the same issues and alleging the same claims as plaintiffs in the *Anthony* case. Ms. Feeney was employed by the Civil Defense Agency of the Commonwealth of Massachusetts from 1963 until March 28, 1975, first

[3] Named as party defendants were the Commonwealth of Massachusetts, the Division of Civil Service, the Civil Service Commission and the Director of the Civil Service. After commencement of the action but prior to decision, the position of the Director of Civil Service was eliminated and its functions transferred to the Personnel Administrator of the Commonwealth, Mass. St. 1975, c. 835.

as a Senior Clerk Stenographer and then as Federal Funds and Personnel Coordinator. She was laid off on March 28, 1975. On May 22, Ms. Feeney, a non-veteran, sought a temporary order restraining the defendants from making or approving any appointment to any permanent position from the eligible list for positions classified as Administrative Assistant or Head Administrative Assistant at the Solomon Mental Health Center in the Department of Mental Health of the Commonwealth. The requested order further sought extension of the expiration date of the eligible list for the latter position. The order was assented to and duly entered, and on May 23, 1975, the court consolidated the two actions.

The defendants moved to dismiss the *Anthony* case as moot due to the passage of an act exempting all attorney positions, including those classified as Counsel I, from the provisions of civil service law, Mass. St. 1975, c. 134, and to dismiss the *Feeney* case for want of subject matter jurisdiction and failure to state a claim upon which relief could be granted. Counsel executed lengthy statements of agreed facts, submitted simultaneous briefs on all issues, and presented oral argument to the three-judge panel on the merits.

On March 29, 1976, the three-judge district court issued the order and opinions appended to this jurisdictional statement. The court found that the claims brought by the plaintiffs in the *Anthony* case were mooted by the passage of the state statute exempting attorney positions from the operation of the civil service law and accordingly entered judgment for the defendants in that case. The court further found that neither the Commonwealth of Massachusetts nor the Division of Civil Service were "persons" within the meaning of 42 U.S.C. § 1983 and therefore dismissed the complaints against them. No notice of appeal was filed as to these aspects of the final judgment and order.

The Court permanently enjoined the remaining defendants[4] from utilizing the veterans' preference statute in filling civil service positions within the Commonwealth. The sharply-divided court held that Mass. Gen. Laws c. 31, § 23, had the effect of depriving female civil service applicants of equal protection of the laws and was unconstitutional. The majority opinion clearly based this holding on an analysis of the impact rather than the purpose of the statute *vis a vis* female applicants. The dissent of Murray, D.J., strongly suggested that the impact analysis employed by the majority was not the proper means to assess the constitutionality of a state statute allegedly violating the Equal Protection Clause of the Fourteenth Amendment. Applying a rational basis test to the challenged statute, Judge Murray concluded that the veterans' preference law passed constitutional muster.

On May 25, 1976, the Attorney General of the Commonwealth filed a notice of appeal from the partial final judgment invalidating Mass. Gen. Laws c. 31, § 23. An application for a stay and a motion for relief from judgment pursuant to Rule 60(b)(6), Fed. R. Civ. P., accompanied the notice. Before a hearing was held on these motions, this Court rendered its decision in *Washington* v. *Davis*, 44 U.S.L.W. 4789 (U.S. June 7, 1976). On June 15, 1976, appellants filed a supplemental motion for relief from judgment, urging reconsideration in light of the intervening decision of this Court. A hearing was held on the motions and application for a stay on June 23, 1976. The motions for relief from judgment were denied from the bench, but the application for a stay pending appeal to this Court was orally allowed. At the request of plaintiff-appellee's counsel, formal action on the stay was delayed one

[4] The remaining defendants are the Civil Service Commission and the Personnel Administrator, who supplanted the Director of Civil Service, n. 3 *supra*.

day to permit the drafting of an order effectively reinstating the earlier temporary restraining order. The formal entry of the stay was rendered by the passage of an interim statute. *See* n. 2 *supra*. On June 28, 1976, the court entered the order appended to this statement denying the motions for relief from judgment but taking no action on the application for a stay (App. D).

An application for an extension of time to docket the appeal was filed with this Court on July 17, 1976, and allowed by order of Brennan, J., on July 20, 1976 (App. E).

The Question is Substantial

I. Introduction

The holding of the court below presents a substantial question requiring either a summary reversal or plenary consideration by this Court.

In invalidating the Massachusetts veterans' preference statute, the court acknowledged that veterans' preference was not enacted for the purpose of disqualifying women from civil service appointments and that females may become veterans and qualify for preferential civil service treatment (App. 20a). The court further indicated that giving a preference to veterans served the legitimate state interest in rewarding those who have rendered public service as members of the military (App. 21a). Nevertheless, the majority concluded that the impact of the statute on females overrides the worthy purpose of the legislative program (App. 28a), that there are alternatives to the program which are less burdensome to the employment opportunities available to women (App. 27a), and that the system therefore violates the Equal Protection Clause of the Fourteenth Amendment (App. 29a).

The decision of the district court is inconsistent with the decision of the court in *Washington* v. *Davis*, 44 U.S.L.W. 4789 (U.S. June 7, 1976), in that the district court improperly found that the facially neutral veterans' preference statute violates the Constitution, without finding that it has a discriminatory purpose. Thus, summary reversal is appropriate.

Moreover, the district court decision is inconsistent with traditional equal protection analysis. The majority failed to articulate a clear standard of review and apparently relied on what the dissenting justice characterized as a "means/end calculus" (App. 35a). Given the fact that more men than women are veterans, any statute granting preference to veterans will necessarily confer a relative advantage on men. If the "means/end" approach adopted by the lower court is allowed to stand, it will therefore call into question the validity of all veterans' preference statutes adopted in the several states or in the federal civil service system. The pervasiveness of such statutes[5] underscores the fundamental importance of this case and the need for plenary consideration by this Court.

II. Summary Reversal Is Appropriate Because The Decision Of The District Court Is Inconsistent With Washington v. Davis.

On June 7, 1976, this Court released its opinion in *Washington* v. *Davis*, 44 U.S.L.W. 4789, a case involving an equal protection challenge to a facially neutral employment practice. The opinion reversed a decision by the Court of Appeals for the District of Columbia Circuit invalidating the Washington, D.C., Police Department's recruiting procedures, which in-

[5] At the present time only four states, Arkansas, Mississippi, New Mexico and South Carolina, have no form of veterans' preference.

cluded administering a written test. The lower court found that a higher percentage of blacks than whites failed the written examination and that a "disproportionate impact, standing alone and without regard to whether it indicated a discriminatory purpose, was . . . sufficient to establish a constitutional violation." 44 U.S.L.W. 4789, 4791. In reversing, Justice White observed for the majority:

> [O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact. 44 U.S.L.W. 4789, 4792 (emphasis in opinion).

In invalidating the veterans' preference statute the district court embraced precisely the type of logic rejected in *Washington* v. *Davis, supra.* The lower court specifically recognized the lack of discriminatory animus in the statute and based its decision solely on the impact of the statute on women. Judge Tauro wrote:

> The Massachusetts Veterans' Preference was not enacted for the *purpose* of disqualifying women from receiving civil service appointments. Theoretically, women are not barred from qualifying as preferred veterans. Yet, the formula's *impact*, triggered by decades of restrictive federal enlistment regulations, makes the operation of the Veterans' Preference in Massachusetts anything but an impartial, neutral policy of selection, with merely an incidental effect on the opportunities for women. (App. 20a.) (Emphasis added.)

If proof of a discriminatory purpose is required when an employment practice affects a suspect classification like race, then *a fortiori* such proof is also required in situations where the impact of the practice is felt by persons of one sex.[6] Thus, the district court erred when it failed to require proof or purposeful discrimination before invalidating the statute on constitutional grounds. The lower court not only failed to require such proof but also found that Mass. Gen. Laws, c. 31, § 23, was not enacted for purposes related to sex discrimination (App. 20a). Thus, the standards applied by the lower court are inconsistent[7] with those articulated in *Washington* v. *Davis, supra,* and that inconsistency mandates a summary reversal.

III. The Massachusetts Veterans' Preference Statute Rationally Promotes Legitimate State Interests And Is, Therefore, Constitutional.

Massachusetts Board of Retirement v. *Murgia,* 44 U.S.L.W. 5077 (U.S. June 25, 1976), reaffirmed the proposition that traditional equal protection analysis requires strict scrutiny of a legislative classification only if it impermissibly interferes

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[6] Distinctions based on sex, it must be noted, have never been held "suspect" by a majority of the Justices of this Court. In *Frontiero* v. *Richardson,* 411 U.S. 677 (1973), a plurality of the Court deemed sex a suspect category triggering a strict scrutiny test.

[7] The inconsistency is further underscored both by the fact that the plaintiffs relied on *Davis* v. *Washington,* 512 F. 2d 956 (D.C. Cir. 1975), in their lower court brief and by the reliance the district court placed on *Castro* v. *Beecher,* 459 F. 2d 725 (1st Cir. 1972), a case the *Davis* Court characterized as wrongly decided. 44 U.S.L.W. 4789, 4793 at n. 12.

with a fundamental right[8] or impinges on the rights of a suspect class.[9] Other state classifications are examined under the rational basis standard, "a relatively relaxed standard reflecting the Court's awareness that the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one." *Id.* at 5079.

The opinion of the district court proceeded from a recognition of the fact that there is no fundamental right to public employment (App. 28a). Furthermore, the lower court found it unnecessary to determine whether classifications based upon sex are suspect (App. 20a),[10] choosing instead to base its opinion on the impact of the statute on women. Because neither a fundamental right nor a suspect classification was involved, a rational basis test rather than a strict scrutiny test should have been applied. However, the court did not apply a rational basis test. While it is unclear what test was applied, the majority opinion discloses that the court engaged in a "least

[8] Among the fundamental rights requiring application of a strict scrutiny standard are the right to equal access to the vote, *Bullock* v. *Carter*, 405 U.S. 134 (1972); freedom of speech and association, *Williams* v. *Rhodes*, 393 U.S. 23 (1968); and the right of interstate travel, *Shapiro* v. *Thompson*, 394 U.S. 618 (1969).

[9] Only three classifications have been found suspect by the Supreme Court. They are race, *McLaughlin* v. *Florida*, 379 U.S. 184 (1964); ancestry or national origin, *Oyama* v. *California*, 332 U.S. 633 (1948); and alienage, *Graham* v. *Richardson*, 403 U.S. 365 (1971).

[10] As recently as April 15, 1975, this Court similarly found it unnecessary "to decide whether a classification based on sex is inherently suspect." *Stanton* v. *Stanton*, 421 U.S. 7, 13 (1975). Cases in which this Court has struck down a statute because it deprives females of equal protection have uniformly involved a *de jure* classification establishing two groups, one comprised solely of males and the other solely of females. *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975); *Frontiero* v. *Richardson*, 411 U.S. 677 (1973); *Reed* v. *Reed*, 404 U.S. 71 (1971).

restrictive alternative" inquiry.[11] That test is a corollary of strict scrutiny and is only appropriate where fundamental constitutional rights or liberties are at stake. *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 51 (1973).

Had the three-judge district court applied a rational basis test, the statute clearly would have withstood judicial scrutiny. Until the decision of the court below, veterans' preference statutes have been uniformly upheld by the federal courts whenever challenged as a violation of the Equal Protection Clause. *Rios* v. *Dillman*, 499 F. 2d 329 (5th Cir. 1974); *Feinerman* v. *Jones*, 356 F. Supp. 252 (M.D. Pa. 1973); *Koelfgen* v. *Jackson*, 355 F. Supp. 243 (D. Minn. 1972), *aff'd mem.* 410 U.S. 976 (1973); *Russell* v. *Hodges*, 470 F. 2d 212, 218 (2d Cir. 1972). The courts have reached such decisions on the basis of traditional equal protection analysis "which requires only that the State's system be shown to bear some rational relationship to legitimate state purposes." *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 40 (1973).

It is beyond dispute that the Commonwealth has legitimate state interests which are served by veterans' preference. The majority opinion of the district court states:

> Massachusetts, like other states, and like the federal government, has consistently provided preferential treatment in public employment to those who have served in the nation's armed forces. . . . The modern Veterans' Pref-

[11] "[T]he fact is that there are alternatives available to the state to achieve its purpose of aiding veterans, without doing so at the singular expense of another identifiable class, its women. . . . Given the fact that effective, but less drastic, alternatives are available, the state may not give an absolute and permanent preference in the area of public employment to its veterans at the expense of its women who, because of circumstances totally beyond their control, have little if any chance of becoming members of the preferred class." (App. 27a, 28a-29a.)

erence Statute has its roots in legislation enacted in the seventeenth century and represents a key phase of the Commonwealth's continuing efforts on behalf of veterans. The program is designed to encourage service in the armed forces, reward those whose lives have been disrupted because they have served, and provide some assistance during the sometimes uneasy transition from military to civilian life.

Nothing in the Fourteenth Amendment prohibits Massachusetts from providing special treatment to veterans in considering candidates for public employment. . . . Such a policy responsibly recognizes both the special problems of veterans and the need to promote an important aspect of the nation's welfare. (App. 21a-23a.) (Footnotes and citations omitted.)

These legitimate state purposes are rationally furthered by the veterans' preference statute, which serves:

> (1) As a recognition that the experience, discipline, and loyalty which veterans gain in military service is conducive to the better performance of public duties;
>
> (2) As a reward for those veterans who, either involuntarily or through enlistment, have served their country in time of war; and
>
> (3) As an aid in the rehabilitation and relocation of the veteran whose normal life style has been disrupted by military service. (App. 43a, citing *Feinerman* v. *Jones*, 356 F. Supp. 252, 259 (M.D. Pa. 1973).)

By its operation, the Massachusetts veterans' preference statute seeks to accommodate the provision of benefits to those who have served in the military with the need of the Commonwealth for an effective work force. It may be argued that

Mass. Gen. Laws c. 31, § 23, only roughly accommodates these sometimes conflicting interests and that it could have been more wisely drawn. Indeed, although most states and the federal government have enacted statutes designed to afford veterans an employment preference, none of those other statutes is drafted in precisely the same fashion as the Massachusetts law. Nevertheless, judgments as to the wisdom of a state statute and determinations related to the accommodation of competing interests are uniquely amenable to legislative rather than judicial resolution. In *Kahn* v. *Shevin*, 416 U.S. 351 (1974), this Court noted:

> [T]he issue, of course, is not whether the statute could have been drafted more wisely, but whether the lines chosen by the Florida Legislature are within the constitutional limitations. The dissents would use the Equal Protection Clause as a vehicle for reinstating notions of substantive due process that have been repudiated. "We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies . . . elected to pass laws." *Id.* at 356, n. 10, *quoting Ferguson* v. *Skrupa*, 372 U.S. 726, 730 (1963).

Accord, Massachusetts Board of Retirement v. *Murgia, supra*; *Dandridge* v. *Williams*, 397 U.S. 471 (1970); *Williamson* v. *Lee Optical Co.*, 348 U.S. 483 (1955). Because the Massachusetts law rationally promotes legitimate state interests without infringing on fundamental rights or the rights of a suspect class, the lower court should not have substituted its judgment for that of the General Court by engaging in a search for a less restrictive alternative. The district court should have applied a rational basis test to the challenged statute and upheld it on constitutional grounds.

Conclusion

The question presented by this statement is substantial. Appellants respectfully urge this Court to reverse summarily the decision of the district court or to note probable jurisdiction and set the case down for argument.

Respectfully submitted,

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Appendix A.

United States District Court.
District of Massachusetts.

CAROL A. ANTHONY, ET AL.

v.

THE COMMONWEALTH OF MASSACHUSETTS, ET AL.

CIVIL ACTION
No. 74-5061-T

HELEN B. FEENEY

v.

THE COMMONWEALTH OF MASSACHUSETTS ET AL.

CIVIL ACTION
No. 75-1991-T

Judgment and Order.

March 29, 1976.

TAURO, D.J.

1. Judgment is entered in favor of the defendant in *Anthony* v. *Commonwealth*, CA 74-5061-T on grounds of mootness. (Opinion pages 16-23.)

2. Judgment is entered in favor of the Commonwealth of Massachusetts and the Division of Civil Service in *Feeney* v. *Commonwealth*, CA 75-1991-T, because these defendants are not "persons" within the meaning of 42 U.S.C. § 1983. (Opinion page 2 n. 2.)

3. Judgment is entered in favor of the plaintiff Feeney in No. 75-1991-T, against the Massachusetts Director of Civil

Service and the members of the Massachusetts Civil Service Commission on the grounds that Mass. Gen. Laws ch. 31, § 23 (The Massachusetts Veterans' Preference) is unconstitutional in that it operates to deprive female civil service applicants equal protection of the laws. (Opinion pages 23-37.)

It is ORDERED that:

(a) The Massachusetts Director of Civil Service and the members of the Massachusetts Civil Service Commission are hereby permanently enjoined from utilizing Mass. Gen. Laws ch. 31, § 23 in any future selection of persons to fill civil service positions with the Commonwealth.

(b) This injunction shall have no effect upon the continued status of any individual in a permanent civil service position who holds that position on the date of this injunction.

LEVIN H. CAMPBELL,
Circuit Judge.

JOSEPH L. TAURO,
District Judge.

United States District Court.
District of Massachusetts.

CAROL A. ANTHONY, ET AL.

v.

THE COMMONWEALTH OF MASSACHUSETTS, ET AL.

CIVIL ACTION
No. 74-5061-T

HELEN B. FEENEY

v.

THE COMMONWEALTH OF MASSACHUSETTS, ET AL.

CIVIL ACTION
No. 75-1991-T

Opinion.

March 29, 1976.

TAURO, *District Judge.* These two actions are brought under 42 U.S.C. § 1983 by four female Massachusetts residents who claim they failed to receive Civil Service appointments with the Commonwealth due to the operation of the Massachusetts Veterans' Preference Statute,[1] Mass. Gen. Laws ch. 31, § 23, which they claim unconstitutionally discriminates against them because of their sex. They now seek to permanently enjoin the continued enforcement of § 23.

Temporary restraining orders, consented to by all parties, were entered in each case by a single judge of this court

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[1] *See* Appendix.

prohibiting the defendants[2] from making, or preparing to make, recommendations for positions sought by the plaintiffs pending the outcome of this litigation. *See* 28 U.S.C. § 2284(3). The parties in both actions submitted agreed statements of fact. The cases were consolidated for argument and then submitted for a decision on the merits.

I.

The Massachusetts Civil Service System covers approximately 60% of those employed by the Commonwealth. In the Classified Official Service, the division which includes the positions sought by the plaintiffs, 47,005 appointments (not including promotions) were made during the ten year period between July 1, 1963 through June 30, 1973. Forty-three percent (20,211) of those appointees were women while 57% (26,794)

[2] Named as defendants in each case are the Commonwealth of Massachusetts; The Division of Civil Service of the Commonwealth of Massachusetts; Edward W. Powers, individually and in his capacity as the Director of Civil Service; Nancy B. Beecher, Wayne A. Healy and Helen C. Mitchell, individually and as members of the Massachusetts Civil Service Commission.

As the defendants correctly point out, neither the Commonwealth of Massachusetts nor the Division of Civil Service are "persons" within the meaning of § 1983 and, therefore, are not proper parties to any lawsuit brought under that section. *Gay Students Organization of University of New Hampshire* v. *Bonner*, 509 F. 2d 652 (1st Cir. 1974). *See Kenosha* v. *Bruno*, 412 U.S. 507 (1973); 365 U.S. 167 (1961). Nor have the parties stipulated to any facts which would permit the inference that $10,000 or more is involved in any of the plaintiffs' claims, thereby allowing them to be maintained under 28 U.S.C. § 1331. The actions against those two defendants must therefore be dismissed.

We do not reach the question of whether the Eleventh Amendment also bars actions of this type from being maintained against the Commonwealth of Massachusetts or the Division of Civil Service. *See Edelman* v. *Jordan*, 415 U.S. 651 (1974).

were men. Of the women appointees, 1.8% (374) were veterans, while 54% of the men (14,476) had veteran status.

This overall 57-43 ratio of men to women in the Official Civil Service does not tell the whole story, however. A large percentage of female appointees serve in lower grade permanent positions for which males traditionally have not applied. Some females obtained civil service appointments through a now-defunct practice by which appointing authorities requested only female applicants for particular jobs from the Civil Service Division. Other females have been appointed from lists which did not include many veterans. Agreed Statements of Facts in *Anthony* v. *Commonwealth* [hereinafter Anthony Statement] ¶21; Agreed Statement of Facts in *Feeney* v. *Commonwealth* [hereinafter Feeney Statement] ¶20.

Employment security is an attractive feature of a permanent civil service appointment. An appointee chosen for such a position, who successfully completes a six-month probationary period, receives essentially permanent tenure. Mass. Gen. Laws ch. 31, § 20D. Such appointee cannot be discharged except for cause, and is statutorily entitled to a hearing at which the basis for dismissal may be challenged. Mass. Gen. Laws ch. 31, § 43.

The first step toward obtaining a permanent civil service appointment is the taking of an examination administered by the Civil Service Division. The examination is designed to measure an applicant's relative ability and fitness for the particular position he seeks. For certain positions an "unassembled examination" is administered, consisting merely of assigned scores based upon an applicant's training and experience. For other positions, an applicant is required to take a written test, the results of which will serve as one element in a composite score reflecting an evaluation of the applicant's training and experience.

Once an applicant passes the examination, he becomes an "eligible" and is placed on an "eligible list." Those on the eligible list are then ranked as follows under a formula which is the basis for plaintiffs' complaint:

1. Disabled veterans in order of their composite scores.
2. Other veterans in order of their composite scores.
3. Widows and widowed mothers of veterans in order of their composite scores.
4. All other eligibles in order of their composite scores.

Mass. Gen. Laws ch. 31, § 23.

The Veterans' Preference provided in § 23 is, therefore, an integral part of the selection process. Although a veteran must achieve a passing test grade, an eligible non-veteran can never be placed ahead of a veteran, regardless of how superior his test score might be. As a practical matter, therefore, the Veterans Preference replaces testing as the criterion for determining which eligibles will be placed at the top of the list.[3]

Whenever a state agency needs to fill a Civil Service vacancy, it notifies the Civil Service Division. The Civil Service Director then "certifies" several candidates for appointment from the top of the appropriate eligible list, in ratios set forth in various administrative regulations, by sending those names to the appointing authority. In most instances, more names are certified for appointment than there are vacancies

[3] As noted, within the category of veterans, the statute provides an additional preference for disabled veterans and within the category of non-veterans, the statute provides a preference for widows and mothers of veterans. The parties have not submitted data on the number of individuals who come within these two sub-categories, nor does it appear that their presence has any impact on the plaintiffs' basic contentions. *But see Hutcheson* v. *Director of Civil Service*, 361 Mass. 480, 281 N.E. 2d 53 (1972).

in order to give the appointing authority a measure of discretion in the actual hiring decision. The appointing authority is required to make the appointment from among the names so certified, but is not required to appoint the person highest on the list. Feeney Statement ¶9.

A full eligible list remains in effect for a maximum of two years, except when no eligibles remain available for appointment before the expiration of that period, or when a new examination is given for a position during the two year effective period of an eligible list. In the latter instance, the remaining eligibles on the prior list are integrated into the new list in order of their composite scores within each preference category. All eligibles who have attained a particular composite score within a preference category must be included among the eligibles certified for appointment. For example, should the Director, in accordance with a given regulation, certify that the five highest scores were 95 to 99, there might well be a number of eligibles who scored within that range. All would be certified.

II.

This Civil Service appointment scheme, subject as it is to the Veterans' Preference formula, is affected in its practical impact by a number of federal statutes and regulations which have limited sharply the opportunity for women to serve in the armed forces. Indeed, the percentage of females in the Official Civil Service who are also veterans (1.8%), is a reflection of the fact that, during most of the post-World War II period, no more than 2% of the armed forces personnel could be women. *See, e.g.*, 32 C.F.R. § 580.4(b). It is not surprising, therefore, that, currently only 2% of Massachusetts veterans are women. Feeney Statement ¶31.

Historically, women were excluded from the military until 1918 when approximately 10,000 were allowed to enlist in the

Navy. After World War I, these volunteer groups were disbanded. Thereafter, until 1942, only nurses were allowed to enlist. Feeney Statement ¶35. From 1948 until 1967, women were prohibited from making up more than 2% of the total personnel in the armed forces.[4] The Army, the largest branch of the nation's armed services, still maintains a 2% limitation by regulation. 32 C.F.R. § 580.4(b).

Apart from these absolute limitations, various enlistment and appointment criteria have, until recently, been more stringent for women than for men. A man may enlist at age 17. But, until 1967, women were statutorily barred until age 18. 10 U.S.C. § 505 *as amended* by Act of May 24, 1974, Pub. L. No. 93-290 § 1, 88 Stat. 173 Joint Anthony/Feeney Exhibits 100-04 [hereinafter J. Exhs.]. Parental consent was required of women under 21. For men, the age was 18. Feeney Statement ¶38. Moreover, women seeking enlistment have been subject to higher mental aptitude test score requirements and more rigorous physical requirements than men, as well as more extensive application and screening procedures, including requirements for personal references and attractive appearance. J. Exhs. 93, p. 14, 99, 100-04, 107-10, 123, 154. Until recently, the armed services prohibited the enlistment and appointment of married women and women with children less than 18 years of age, while similarly situated men were not so excluded. Feeney Statement ¶38; J. Exhs. 98, 99, p. 2, 103, 104. And, of course, women have always been ineligible for the draft.

[4] 10 U.S.C. § 3209, *repealed by* Act of November 8, 1967, Pub. L. No. 90-130 § 1(9)(e), 81 Stat. 375; 10 U.S.C. § 3215, *repealed by* Act of November 8, 1967, Pub. L. No. 90-130 § 1(9)(H), 81 Stat. 375; 10 U.S.C. § 5410, *repealed by* Act of November 8, 1967, Pub. L. No. 90-130 § 1(16), 81 Stat. 376; 10 U.S.C. § 8208 *repealed by* Act of November 8, 1967, Pub. L. No. 90-130, § 1(26)(c), 81 Stat. 382; 10 U.S.C. § 8215, *repealed by* Act of November 8, 1967, Pub. L. No. 90-130, § 1(26)(E), (F), 81 Stat. 382.

Nothing in the Massachusetts scheme prohibits women from competing for civil service positions. But the practical consequence of the operation of these federal military proscriptions, in combination with the Veterans Preference formula is inescapable. Few women will ever become veterans so as to qualify for the preference; and so, few, if any, women will ever achieve a top position on a civil service eligibility list, for other than positions traditionally held by women.

The plaintiffs contend that this consequence has effectively deprived them of an opportunity to compete for the most attractive positions in the state civil service. They maintain that such an absolute and permanent negative impact on the opportunities of women to obtain significant public employment consistent with their qualifications violates the equal protection clause of the Fourteenth Amendment. It is to these specific contentions that we now turn.

III.

A.

The *Anthony* Case.

The plaintiff Carol A. Anthony, is a female resident of Massachusetts, admitted to practice law here. She is a provisional appointee to a counsel position in the Massachusetts Department of Public Welfare. On January 9, 1974, she applied to take an announced unassembled examination for appointment to the permanent position of Counsel I. Her qualifications were rated in May 1974 and Ms. Anthony received a grade of 94, which tied her for the highest score received by any applicant. But, when the eligible list of applicants was established on October 25, 1974, Ms. Anthony, a non-veteran, was not ranked at the top of the list. Instead, she was ranked 57th behind 56 veterans, all of whom were

men and 54 of whom had lower scores than she on the examination. Since new applications were continuously accepted and processed, Ms. Anthony claims that the names of 20 additional veterans who applied for the positions after she did (all of whom were men and 19 of whom received lower scores) were then integrated into the list ahead of her, reducing her eventual position on the list to 77th.

The parties have stipulated that, but for the restraining order entered in the *Anthony* case on November 4, 1974, the defendants would have begun the certification process, and that Ms. Anthony would not have been certified for any of the 19 permanent Counsel I positions which had by that time been requisitioned. Anthony Statement ¶ 15. Given her position on the list, defendants concede that it is unlikely that Ms. Anthony would have been reached for certification for any subsequent counsel vacancy.

If, on the other hand, the Counsel I list had been established by ranking eligibles in the order of their examination grades, without application of the Veterans' Preference formula, Ms. Anthony would have been among the first considered for appointment to permanent Counsel I positions. Solely because of defendants' application of the Veterans' Preference Statute, therefore, Ms. Anthony's position on the list was reduced from a tie for first place to at least 57th. She claims she was thereby effectively deprived of an equal opportunity to be considered for appointment to a permanent Counsel I position. Anthony Statement ¶¶ 9-13, 15, 16, 29; Feeney Statement ¶¶ 9-18; Anthony Exhs. 2, 3, 81; Feeney Exhs. 9, 11; Appendix A.

Plaintiff Kathryn Noonan is also a female resident of Massachusetts, admitted to practice law here. In early 1974, Ms. Noonan applied for a counsel position at the Labor Relations Commission. She was informed by its Chairman that a statewide examination for the position was imminent and that,

as a result of the Veterans' Preference Statute, her status as a non-veteran gave her little chance of being considered for permanent appointment to the position. Moreover, any interim, provisional appointment as a counsel which she might receive would be terminated after the certification of a veteran. Ms. Noonan was instead offered, and accepted, a provisional appointment to the position of Labor Relations Examiner with the Labor Relations Commission since no statewide examination for that position was pending. Although she assumed the duties and responsibilities of a counsel, she had the title of an examiner and received the pay for that position which is of a lower grade and pay than a Counsel I position.

Ms. Noonan, however, also took the Counsel I unassembled examination in May 1974. She eventually received a grade of 94, which was the highest grade received by any applicant. Like Ms. Anthony, Ms. Noonan was not ranked at the top of the eligible list for the Counsel I position, but was instead ranked with Ms. Anthony behind at least 56 veterans, all of whom were men and 54 of whom received lower grades on the examination.

But for the entry of the restraining order, the parties agree that Ms. Noonan, like Ms. Anthony, would not have been certified for any of the 19 Counsel I positions then available and would not have been considered for any Counsel I position. If, on the other hand, the Counsel I list had been established by ranking eligibles in the order of their examination grades, without application of the Veterans' Preference formula, Ms. Noonan would have been certified and placed among the first group considered for appointment to permanent Counsel I positions. Indeed, she was told by the Chairman of the State Labor Relations Commission in late 1974 that she would have been recommended for such an appointment. Ms. Noonan's position on the list was substantially reduced,

and she was deprived of these opportunities for appointment to a Counsel I position in 1974, solely because of defendants' application of the Veterans' Preference Statute. Anthony Statement ¶¶ 9-14, 15-17, 29; Feeney Statement ¶¶ 9-18; Anthony Exhs. 2, 3, 82, 84; Feeney Exhs. 9, 11; Appendix A.

The plaintiff Betty A. Gittes is a female resident of the Commonwealth and maintains a private law practice here. She is not a veteran. In early 1974, Ms. Gittes applied for a permanent appointment to a Counsel I position. She received a grade of 92 on the unassembled examination, which tied her for the second highest score received by any applicant. Instead of being ranked near the top of the eligible list by virtue of her examination grade, however, Ms. Gittes was ranked 103rd, behind, among others, 76 veterans, all of whom were men and 64 of whom received lower grades on the examination than she. Like her co-plaintiffs, Ms. Gittes would not have been certified for any of the 19 Counsel I positions which were available and would not have been considered for any Counsel I position. Had the list been established by ranking eligibles in order of their examination grades and without application of the Veterans' Preference Statute, however, Ms. Gittes would have been among the first group of people considered for appointment to permanent Counsel I positions. Anthony Statement ¶¶ 9-13, 15, 16, 29; Feeney Statement ¶¶ 9, 18; Anthony Exhs. 2, 3, 83; Feeney Exhs. 9, 11; Appendix A.

B.

The *Feeney* Case.

The plaintiff Helen B. Feeney is a female resident of the Commonwealth, and is not a veteran. She has been a long-

time employee of the Commonwealth, having served in the Civil Defense Agency from 1963 to 1967 as a Senior Clerk Stenographer and from 1967 to 1975 as Federal Funds and Personnel Coordinator.

Mrs. Feeney's experience with Civil Service examinations has been extensive. On February 6, 1971, she took an examination for the single position of Assistant Secretary, Board of Dental Examiners. Although she received the second highest grade of 86.68 on the examination, the application of the Veterans' Preference formula caused her to be ranked sixth on the list behind five veterans, all of whom were male and four of whom received lower grades. She was not certified and a male veteran with an examination grade of 78.08 was appointed.

On February 24, 1973, Mrs. Feeney took an examination for the single position of Head Administrative Assistant, Solomon Mental Health Center. Although she received a grade of 92.32, which was the third highest grade on the examination, the application of Veterans' Preference formula caused her to be ranked 14th on the list behind 12 veterans, all of whom were men and 11 of whom had lower examination grades than she. But for the application of the Veterans' Preference, Mrs. Feeney would have been certified as eligible for the position. Instead, she was not certified.

On or about May 18, 1974, Mrs. Feeney took an examination for positions classified as Administrative Assistant. Although she received an examination grade of 87, which would have tied her for 17th place on the list, the Veterans' Preference formula caused her to be ranked 70th behind 64 veterans, 63 of whom were men and 50 of whom had lower examination grades. Although no appointments to any of the seven positions requisitioned from this list (or to any of the 36 other positions now filled by provisionals) have yet been made because of this court's outstanding temporary restraining order,

Mrs. Feeney's opportunity to be considered for appointment to any of these positions has been substantially diminished because of the application of the Veterans' Preference formula. Anthony Statement ¶¶ 9, 18, 19; Feeney Statement ¶¶ 10, 17, 27; Anthony Exhs. 5, 8; Feeney Exhs. 2, 4, 7, 61, 82; Appendices B, C.

On March 28, 1975, Mrs. Feeney was laid off from her position with the Commonwealth's Civil Defense Agency and has since been unemployed. Feeney Exhibit 82.

IV.

A threshold legal question is whether there remains a live controversy between the plaintiffs in the *Anthony* case and the defendants named in that action.

On April 17, 1975, the Massachusetts legislature enacted ch. 134 of the Acts of 1975, amending Mass. Gen. Laws ch. 31, § 5.[5] The amendment, which became effective on

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[5] Mass. Gen. Laws ch. 31, § 5 now provides:

> No rule made by the [Civil Service] commission shall apply to the selection or appointment of any of the following:
>
> . . . . . .
>
> counsels, attorneys-at-law, including *attorneys designated as counsel or counsellors-at-law, city solicitors, assistant solicitors, town counsels and assistant town counsels* (new language emphasized).

Section 2 of the 1975 amending statute then provides:

> SECTION 2. The provisions of section five of chapter thirty-one of the General Laws, as amended by section one of this act, shall not impair the civil service status of any person holding employment on a permanent basis on the effective date of this act.

July 16, 1975, removed all appointments for state and municipal legal positions made after its effective date from the provisions of the state civil service law. Thus, the positions sought by the three plaintiffs in the Anthony case are no longer subject to the Veterans' Preference. Accordingly, the defendants now claim that the *Anthony* case is moot.

Although the *Anthony* plaintiffs did present a justiciable claim at the outset of the litigation, the "case or controversy" limitation of Article III requires "an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Preiser* v. *Newkirk*, 422 U.S. 395, 401 (1975), *quoting Steffel* v. *Thompson*, 415 U.S. 452, 459 n. 10 (1974). *See DeFunis* v. *Odegaard*, 416 U.S. 312 (1974); *Britt* v. *McKenney*, ____ F. 2d ____ (1st Cir. 1976); *Marchand* v. *Director, U.S. Probation Office*, 421 F. 2d 331, 332 (1st Cir. 1970). The doctrine of mootness is designed to shield the federal courts from rendering advisory opinions on what the law should be, or being drawn into disputes not affecting the rights of the litigants who are before them. *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971). *Cf. Warth* v. *Seldin*, 422 U.S. 490, 499 n. 10 (1975). The question in each case, therefore, is whether there is a substantial controversy between parties of sufficient immediacy and reality which would allow a court to grant specific relief through a decree of conclusive character. *Aetna Life Insurance Co.* v. *Haworth*, 300 U.S. 227, 240-41 (1937). In the *Anthony* case, this question must be answered in the negative.

In 1974, when this action was originally brought, the likelihood of the *Anthony* plaintiffs obtaining appointment to Counsel I, or any legal position covered by Civil Service, was unquestionably affected by the Veterans' Preference. Even though the *Anthony* plaintiffs had all received high scores on the unassembled examination they were faced with a situation where veterans with lower scores would have preceded them

on any certification list. Before the Director of Civil Service established a certification list for Counsel I positions, however, this court entered a temporary restraining order prohibiting him from either establishing an eligible list for Counsel I or making any certification of persons qualified for those positions to the appointing agencies. That action prevented any harm to the plaintiffs from the operation of the Veterans' Preference between the time they took the exam and the effective date of ch. 134.

Now, with Civil Service requirements no longer applicable to these counsel positions, appointing authorities are free to consider the plaintiffs without regard to the Veterans' Preference formula. Accordingly, the relief which the *Anthony* plaintiffs ultimately sought in the courts has now been accorded them through legislation, thereby resolving their underlying complaint.

But the plaintiffs oppose a conclusion of mootness, claiming they were injured by the very compilation of an eligible list in October 1974, on which they were ranked too low even to be certified to an appointing agency, and that the effects of that original injury remain. If the selection process operated as they allege it should have, and the Veterans' Preference did not distort the ranking of eligibles, they maintain they undoubtedly would have been certified and *chosen* for permanent positions by now. Accordingly, they argue that their rights can only be restored by an order requiring that they be considered for appointment now, as they should have been considered late in 1974, and, if they are appointed and successfully complete their probationary periods, that they hold their positions with all the protections of the Civil Service Laws as if appointed in late 1974.

This argument misconstrues the operation of the civil service selection process. A high score on the civil service exam, and resulting certification to an appointing agency, is not and

never has been a guarantee of selection. Had there been no Veterans' Preference when the Counsel I eligible list was compiled in 1974, the *Anthony* plaintiffs were assured only of being *considered* for the various vacancies which arose while the list remained in force. The only cognizable injury the *Anthony* plaintiffs suffered by virtue of the Veterans' Preference was being removed from consideration for Counsel I positions. The enactment of ch. 134 now restores precisely that opportunity to them. Their claim for seniority rights dating back to 1974, therefore, is too speculative to breathe life into an otherwise dead issue between the parties. *Cf. Golden* v. *Zwickler*, 394 U.S. 103 (1969).

To be sure, a Counsel I position today has a slightly different job description than it had in October 1974. Removal of the position from civil service protection means that individuals now appointed do not have "tenure" or the statutory right to a hearing upon discharge. Anyone appointed as a Counsel I, therefore, is subject to a risk not present in October 1974.

The *likelihood* of future injury may, on occasion, serve as a basis for allowing a claim to be maintained even though it may appear at first blush to be moot. *See Super Fire Engineering Co.* v. *McCorkle*, 416 U.S. 115 (1974); *Roe* v. *Wade*, 410 U.S. 113, 125 (1973); *Moore* v. *Ogilvie*, 394 U.S. 814 (1969). But, in this case, any future loss due to the removal of civil service protection, amounts to the *possible* loss of tenure and hearing rights in the event of dismissal. This claim is, at most, incidental to the plaintiffs' attack on the Veterans' Preference and its effect on the initial selection process. Moreover, even if it were somehow related to the plaintiff's complaint, the potential injury resulting from the loss of civil service protection depends upon the occurrence of a chain of events — the plaintiffs' obtaining permanent civil service status, their being discharged and being deprived of a hearing

— which are wholly speculative and now so remote that they do not present any tangible prejudice to any existing interests the plaintiffs may have. *See Preiser* v. *Newkirk*, 422 U.S. 395, 402-03 (1975); *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971); *Hall* v. *Beals*, 396 U.S. 45 (1969). *Cf. O'Shea* v. *Littleton*, 414 U.S. 488 (1974); *Laird* v. *Tatum*, 408 U.S. 1 (1972).

The *Anthony* plaintiffs also claim there is still a likelihood of future harm because they remain interested in non-legal civil service positions which are still covered by the civil service law. Yet, prior to the adoption of ch. 134, the *Anthony* plaintiffs had never clearly indicated such an interest and, indeed, had specifically directed their challenge to the effect of the Veterans' Preference on their opportunities to be considered for Counsel I positions. Moreover, the record does not indicate that they have applied for any other jobs, that they are qualified to hold any other civil service positions, or that the selection process for those positions is affected to the same degree as it allegedly is for the positions they originally sought. To allow the *Anthony* plaintiffs to shift the focus of this case now, and maintain an action because there exists the possibility that they may someday apply for other civil service positions, and might in such an event be deprived of fair consideration because of the operation of the Veterans' Preference, would require us to deal with a controversy which simply does not and may never exist. This we decline to do.

Finally, the *Anthony* plaintiffs maintain that since they have each claimed damages of one dollar their action is still alive. This claim is without merit. Where courts proceed to hear otherwise moot cases because of a claim for damages, that claim is invariably a substantial one, *see, e.g., Stanton* v. *Stanton*, 421 U.S. 7, 11 (1975), hotly contested by the parties. *Powell* v. *McCormick*, 395 U.S. 486, 497-98 (1969). In this case, the plaintiffs made no claim for damages until the

enactment of ch. 134, and they concede that the prayer is only a nominal one. Under these circumstances, the damage claim is clearly incidental to the relief sought and, therefore, cannot properly be the basis upon which the court could find the *Anthony* claim justiciable. *Kerrigan* v. *Boucher*, 450 F. 2d 487, 489-90 (2d Cir. 1971).[8]

Accordingly, this court holds that the claims brought by the three plaintiffs in the *Anthony* case are now moot. We therefore proceed to the merits of the *Feeney* case alone.

V.

A state cannot, without justification, classify its citizens by imposing unequal burdens or awards on otherwise equally situated individuals. In cases involving alleged sex discrimination, the majority position on the Supreme Court would seem to permit a classification based on sex only as long as it was founded on a "convincing factual rationale" which goes beyond "archaic and overbroad generalizations" about the roles of men and women. *Fortin* v. *Darlington Little League, Inc.*, 514 U.S. 344 (1st Cir. 1975). *See Stanton* v. *Stanton*, 421 U.S. 7 (1975); *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975); *Schlesinger* v. *Ballard*, 419 U.S. 498 (1975); *Geduldig* v. *Aiello*, 417 U.S. 484 (1974); *Kahn* v. *Shevin*, 416 U.S. 351

[8] The *Anthony* plaintiffs do not claim that the legislature is likely to reverse its decision to voluntarily remove Counsel I positions from the requirements of civil service, *see, e.g., United States* v. *W. T. Grant Co.*, 345 U.S. 629 (1953), or that controversies of this type are usually so quickly overtaken by events that the issues raised by the *Anthony* plaintiffs are "capable of repetition, yet evading review." *See, e.g., Roe* v. *Wade*, 410 U.S. 113, 125 (1973); *Moore* v. *Ogilvie*, 394 U.S. 814 (1969). *Cf. Cicchetti* v. *Lucey*, 514 F. 2d 362 (1st Cir. 1975).

(1974); *Frontiero* v. *Richardson*, 411 U.S. 677 (1973); *Reed* v. *Reed*, 404 U.S. 71 (1971).[7]

The Massachusetts Veterans' Preference was not enacted for the purpose of disqualifying women from receiving civil service appointments. Theoretically, women are not barred from qualifying as preferred veterans. Yet, the formula's impact, triggered by decades of restrictive federal enlistment regulations, makes the operation of the Veterans' Preference in Massachusetts anything but an impartial, neutral policy of selection, with merely an incidental effect on the opportunities for women. *See, e.g., Castro* v. *Beecher, supra*; *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1 (1973). Nor under the circumstances, can the operation of this formula be viewed as an effort by the Commonwealth to set priorities among competing claims for finite state resources. *Jefferson* v. *Hackney*, 406 U.S. 535 (1972); *Dandridge* v. *Williams*, 397 U.S. 471 (1970); *Williamson* v. *Lee Optical Co.*, 348 U.S. 483 (1955).[8]

[7] Our view of the merits makes it unnecessary to consider the plaintiff's position that sex-based classifications are suspect or that the Veterans' Preference deprives the plaintiffs of a fundamental right, requiring the state to come forward with a showing that the Veterans' Preference is supported by a "compelling interest" in order for it to be sustained. *See Feinerman* v. *Jones*, 356 F. Supp. 252, 256-59 (M.D. Pa. 1973); *Koelfgen* v. *Jackson*, 355 F. Supp. 243, 250 (D. Minn. 1972), *aff'd mem.* 410 U.S. 976 (1973).

[8] This case, therefore, is distinguishable from *Geduldig* v. *Aiello*, 417 U.S. 484 (1974). There, the California disability insurance program was attached because it did not cover expenses incurred as the result of a normal pregnancy, and in so doing placed a disproportionate burden on women. In finding such a limitation on benefits constitutional, the Court noted that the program was financed through a carefully balanced scheme of payroll deductions which did not draw upon general revenues. A requirement that insurance coverage be extended to normal pregnancies which could have cost an additional hundred million dollars, might well have disrupted the program's finances and placed additional burdens on taxpayers and beneficiaries. Under these circumstances, the Court held that the Constitution did not prohibit the state from making a policy judgment to limit premiums and taxes by limiting coverage. Nowhere did the Court hold that *any* state program which had a disproportionate impact on the interests of women would be constitutional or that *any* statute which provided preferential treatment to one class at the expense of another was permissible under the Fourteenth Amendment. In particular *Geduldig* is distinguishable because the class of persons excluded does not consist of all or virtually all women but only pregnant women.

Rather, the Veterans' Preference formula is a deliberate, conscious attempt on the part of the state to aid one clearly identifiable group of its citizens, those who qualify as veterans, by giving them an absolute and permanent preference in public employment. Clearly, the rewarding of those who have rendered public service as members of the military is a worthy state purpose. But, equally as clear is that the means employed by the Commonwealth for achieving that purpose, the preference formula, succeeds at the absolute and permanent disadvantage of another clearly identifiable group, Massachusetts' women.

The pivotal question before us, therefore, is, given the legitimate state purpose of assisting veterans, does the means by which Massachusetts implements that purpose in the area of public employment unconstitutionally deprive women of their equal protection rights under the Fourteenth Amendment. Our answer is that it does and, therefore, that ch. 134 § 23 is unconstitutional.

Massachusetts, like other states, and like the federal government, has consistently provided preferential treatment in public employment to those who have served in the nation's armed forces. *See, e.g.*, Pa. Stat. Ann. tit. 51 § 492.2 *et seq.* *See also* 5 U.S.C. §§ 2108, 3309-12, 3316. The modern Veterans' Preference Statute has its roots in legislation enacted

in the seventeenth century[9] and represents a key phase of the Commonwealth's continuing efforts on behalf of veterans.[10] The program is designed to encourage service in the armed

[9] The first veterans' benefit enacted in this country seems to have been a pension provided by the Plymouth Colony in 1636. Laws of the Colony of New Plymouth [1636] reprinted in The Compact with the Charter and Laws of the Colony 44 (1836). The original public employment preference for veterans was enacted in 1884, Act of June 3, 1884, ch. 320 [1884] Mass. Acts and Resolves 346, and since that time has had what the Supreme Judicial Court has called a "troubled history." *Hutcheson* v. *Director of Civil Service*, 361 Mass. 480, 482, 281 N.E. 2d 53, 54 (1972). *See, e.g., Commissioner of the Metropolitan District Commission* v. *Director of Civil Services*, 348 Mass. 184, 203 N.E. 2d 95 (1964); *Mayor of Lynn* v. *Commissioner of Civil Service*, 269 Mass. 410, 169 N.E. 502 (1929); *Phillips* v. *Metropolitan Park Commission*, 215 Mass. 502, 102 N.E. 717 (1913); *Opinion of the Justices*, 166 Mass. 589, 44 N.E. 625 (1896); *Brown* v. *Russell*, 166 Mass. 14, 43 N.E. 1005 (1896); Note, *Preference of Veterans in the Massachusetts Civil Service*, 10 Harv. L. Rev. 236 (1896).

In recent years both private interest groups and legislative committees have proposed changes in the Veterans' Preference. *See, e.g.*, League of Women Voters of Massachusetts, The Merit System in Massachusetts (1961); Mass. S. Doc. No. 1080, 34-35; Mass. H. Doc. No. 5100 (1967). Contrary to the defendants' assertions, however, the continuing public debate on the economic and social ramifications of reform of the Massachusetts Veterans' Preference does not affect our responsibility to examine the constitutionality of the current scheme.

[10] The special treatment Massachusetts accords veterans in civil service selection is part of an extensive scheme of state aid to veterans. These benefits include exemptions from license fees, *e.g.*, Mass. Gen. Laws ch. 101, § 24, ch. 175, § 167A, exemption from motor vehicle registration fees, Mass. Gen. Laws ch. 90, § 33, preferences for certain low rent and state funded housing projects, Mass. Gen. Laws ch. 121B, §§ 77, 32(f), 34, exemption from tuition for summer sessions, evening classes, extension and correspondence courses at state colleges and universities, Mass. Gen. Laws ch. 73, § 8A; ch. 69, §§ 7, 7A, and certain retirement benefits. Mass. Gen. Laws ch. 32, §§ 253, 56-58B. *See also* Committee on Rules of the Two Branches. A Compilation of the Laws Relating to Veterans and Two Branches. A Compilation of the Laws Relating to Veterans and Their Organizations (1974).

services, reward those whose lives have been disrupted because they have served, and provide some assistance during the sometimes uneasy transition from military to civilian life.

Nothing in the Fourteenth Amendment prohibits Massachusetts from providing special treatment to veterans in considering candidates for public employment.[11] *Rios* v. *Dillman*, 499 F. 2d 329 (5th Cir. 1974); *Feinerman* v. *Jones*, 356 F. Supp. 252 (M.D. Pa. 1973); *Koelfgen* v. *Jackson*, 355 F. Supp. 243 (D. Minn. 1972), *aff'd mem.* 410 U.S. 976 (1973). Such a policy responsibly recognizes both the special problems of veterans and the need to promote an important aspect of the nation's welfare.

But the worthy purpose of a legislative program is not enough to shield its method of implementation from judicial scrutiny, especially in the face of a challenge based on the Equal Protection Clause. In the context of the Fourteenth Amendment, "[t]he result, not the specific intent is what matters." *Rozecki* v. *Gaughan*, 459 F. 2d 6, 8 (1st Cir.

[11] The recent cases in which courts have had occasion to sanction the policies behind the Veterans' Preference in the face of attacks based on the Fourteenth Amendment have not involved the type of challenge presented in this case. In neither *Rios* v. *Dillman*, 499 F. 2d 329 (5th Cir. 1974) nor *Koelfgen* v. *Jackson*, 355 F. Supp. 243 (D. Minn. 1972), *aff'd mem.* 410 U.S. 976 (1973) did the court consider whether the statutes involved in those cases discriminated against women. In *Feinerman* v. *Jones*, 356 F. Supp. 252 (M.D. Pa. 1973), where the Pennsylvania preference was challenged on grounds of sex discrimination, the statute involved there provided for a point-bonus system, as opposed to an absolute and permanent preference for veterans. The court held that on the record presented in that case the plaintiff had not demonstrated that the particular statute challenged operated in a discriminatory way. *See also Russell* v. *Hodges*, 470 F. 2d 212, 218 (2d Cir. 1972); *White* v. *Gates*, 253 F. 2d 868 (D.C. Cir.), *cert. denied*, 356 U.S. 973 (1958); *People ex rel. Sellers* v. *Brady*, 262 Ill. 578, 105 N.E. 1 (1914); *Goodrich* v. *Mitchell*, 68 Kan. 765, 75 P. 1034 (1904); *State ex rel. Kangas* v. *McDonald*, 188 Minn. 157, 246 N.W. 900 (1933); *Commonwealth ex rel. Graham* v. *Schmid*, 333 Pa. 568, 3 A. 2d 701 (1938).

1972); *Boston Chapter, N.A.A.C.P., Inc.* v. *Beecher*, 504 F. 2d 1017, 1021 (1st Cir. 1974) *cert. denied*, 421 U.S. 910 (1975). *See, e.g., Taylor* v. *Louisiana*, 419 U.S. 522 (1975); *Griffin* v. *Illinois*, 351 U.S. 12 (1956); *Smith* v. *Allwright*, 321 U.S. 649 (1944); *Guinn* v. *United States*, 238 U.S. 347 (1915). As Judge Wright has noted: "[t]he arbitrary quality of thoughtlessness can be as disasterous and unfair to private rights and the public interest as the perversity of a willful scheme." *Hobson* v. *Hansen*, 269 F. Supp. 401, 497 (D. D.C. 1967), *aff'd sub nom. Smuck* v. *Hobson*, 408 F. 2d 175 (D.C. Cir. 1969) (en banc).

It is not enough that the prime objective of the Veterans' Preference statute, that of aiding those who have served in our nation's armed forces, is legitimate and rational. The means chosen by the state to achieve this objective must also be legitimate and rational. For a court to examine the means of implementation as well as the purpose of a legislative program is not to second-guess the legislature as to what might have been a more effective or preferable course. Rather, by examining the impact on others of a programmatical effort by the state to intentionally benefit one identifiable segment of its population, this court exercises its fundamental responsibility to ensure that all citizens are treated equally and fairly under the law.

The practical effect of Veterans' Preference is clear. Eligible veterans, regardless of qualifications relative to eligible non-veterans, have the public employment field cleared for them on an absolute and permanent basis. The argument that the preference program is somehow related to job qualifications or performance is specious. For each civil service position, the state normally provides selection criteria related to the demands of the particular job. The Veterans' Preference is in no way based on such criteria. On the contrary, it suspends the application of these job-related criteria and

substitutes a formula that relegates demonstrable professional qualifications to a secondary position, absolutely and permanently.

The negative impact that this absolute preference has on women is dramatic. The list of nineteen eligibles for the Head Administrative Assistant vacancy sought by Mrs. Feeney at the Solomon Mental Health Center included four women. But for the application of the preference, plaintiff Feeney would have ranked third on the list and would have been among the first set of eligibles considered for the position. Application of preference, however, relegated Mrs. Feeney to 14th (behind 12 male veterans, 11 of whom received lower scores than she did) and, as a result, she was not certified for consideration for the position.

Of the four women on the list, none obtained the preference (0%), while 12 of the 15 men (80%) did achieve preferred status. Moreover, in relative terms, the 12 veterans gained an average of four places, while the four women lost an average of seven. But for the application of the Veterans' Preference, three of the four women on the list would have been ranked in the top 12 places. Because of the preference, those places were totally occupied by male veterans.

The same pattern is also evident in the much larger Administrative Assistant list which served as a pool for numerous positions in state government. Plaintiff Feeney, whose test score would have put her within the top twenty positions, ranked 70th on the list behind 52 veterans with lower scores and 12 veterans with the same or higher scores. Of the 41 women on the list, 37 were ranked below male veterans who received lower scores than they did; one qualified for the preference (2.5%) while 63 of the 135 men (47%) did so. These 41 women lost an average of 21.5 places each while 63 male veterans gained an average of 28 places each. If the list had been compiled without the Veterans' Preference, nearly 40%

of the women would have occupied the top third of the list which is now occupied, with one exception, by men.

The phenomenon illustrated in the lists on which Mrs. Feeney was named is not an aberration. The parties have submitted fifty eligible lists in both the *Anthony* and *Feeney* cases, compiled chiefly from 1971 through 1975. *Anthony* Exhs. 11-60; *Feeney* Exhs. 13-62. In every one, the application of the Veterans' Preference, in significant fashion, causes men to gain places at the expense of women. Moreover, of the approximately 500 men and 1200 women represented on the lists, 38% of the men are veterans while only 0.6% of the women are veterans. And in each of the lists, one or more female eligibles were placed behind male veterans with lower scores and were thereby deprived of certification opportunity which, otherwise, they would have had.

To be sure, 43% of the permanent appointments in a ten year period from 1963 to 1973 have been women (even though 56% of the women who took civil service examinations in that 10 year period passed). Yet, a closer examination of those figures reveals, as is conceded by all parties, that the female appointees are generally clerks and secretaries, lower-grade and lower-paying positions for which men traditionally have not applied. Few, if any, females have ever been considered for the higher positions in the state civil service.

Women's lack of success in obtaining significant state employment has no relation to any objective standard of assessing qualifications. Rather, the percentage of female civil service appointees is inescapably tied to circumstances totally beyond their control, or choice — the federal government's policy of limiting the number of women who may serve in the armed forces. In practical application, the combination of federal military enrollment regulations with the Veterans' Preference is a one-two punch that absolutely and permanently

forecloses, on average, 98% of this state's women from obtaining significant civil service appointments.

Whatever their merit[18] in terms of military priorities, it is clear that federal military enlistment regulations make it unlikely that a woman will serve in the armed forces and, thereby, become eligible for the Massachusetts Veterans Preference. Facially, the Veterans' Preference is open to both men and women. But to say that it provides an equal opportunity for both men and women to achieve a preference would be to ignore reality. By making status as a veteran the *sine qua non* for obtaining the most attractive positions in the state civil service, Massachusetts has effectively and unquestioningly incorporated into its public employment policy a set of criteria having no demonstrable relation to an individual's fitness for civilian public service. By doing so it has caused disastrous negative consequences for the employment opportunities of women, a clearly identifiable segment of the Commonwealth's population entitled to fair and equal protection under the law.

Despite its troublesome impact on the women of this Commonwealth, the operation of the Massachusetts Veterans' Preference might escape constitutional rejection if it were the only means by which the state could implement a program of veterans assistance in the area of public employment. But, the fact is that there are alternatives available to the state to achieve its purpose of aiding veterans, without doing so at the singular expense of another identifiable class, its women.

For example, a point system could be established designed to offer some reward for length of service in the armed services and/or to recognize particular abilities and skills likely to have

[18] We express no opinion on the constitutionality of this series of statutes and regulations affecting the opportunities of women in the armed services.

been acquired as a result of military service.[13] A time limit for exercising the preference could also be established so as to tailor its use to those who have shortly returned to civilian life. Such approaches would not *absolutely* and *permanently* disadvantage the women of this Commonwealth to the advantage of a male veteran. Of course, the constitutionality of any such alternatives are not now before us. Nor by mentioning them do we assume the role of a super-legislature. We point out such alternatives only to indicate that Massachusetts has considerable flexibility in the manner in which it can aid its veterans, without doing so at the absolute and permanent expense of its women.

While there is no constitutional right to public employment, once a state decides to provide public service jobs, the Fourteenth Amendment demands that it must do so in a fair and equitable manner.[14] But this Veterans' Preference formula, tied as it is to federal military enrollment policy, is neither fair nor equitable in its impact on women. Given the fact that effective, but less drastic, alternatives are available, the state may not give an absolute and permanent preference in the area of public employment to its veterans at the expense of its women who, because of circumstances totally beyond their control, have little if any chance of becoming members of the

[13] The Veterans' Preference provided for applicants to federal civil service positions operates on just such a principle. 5 U.S.C. §§ 2108, 3309-12, 3316. *See generally* U.S. Civil Service Commission, History of Veterans' Preference in Federal Employment (1956). *Cf. Johnson* v. *Robison*, 415 U.S. 361 (1974); *Mitchell* v. *Cohen*, 333 U.S. 411 (1948).

[14] *Boston Chapter N.A.A.C.P., Inc.* v. *Beecher*, 504 F. 2d 1017 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); *Castro* v. *Beecher*, 459 F. 2d 725 (1st Cir. 1972); *Feinerman* v. *Jones*, 356 F. Supp. 252, 257-58 (M.D. Pa. 1973). *Cf. Pickering* v. *Board of Education*, 391 U.S. 563 (1968); *Greene* v. *McElroy*, 360 U.S. 474 (1959); *Slochower* v. *Board of Higher Education*, 350 U.S. 551 (1956); *Wieman* v. *Updegraff*, 344 U.S. 183 (1952).

preferred class. Under these circumstances, this court holds that Mass. Gen. Laws ch. 31, § 23 deprives women of equal protection of the laws and, therefore, is unconstitutional.[15]

LEVIN H. CAMPBELL,
Circuit Judge.

JOSEPH L. TAURO,
District Judge.

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[15] In view of this holding we have no occasion to consider the plaintiff's argument that the Massachusetts Veterans' Preference violates due process by creating an irrebuttable presumption which has no basis in fact.

Appendix.

Mass. Gen. Laws ch. 31, § 23, the heart of the Veterans' Preference provisions of the Massachusetts Civil Service Law, provides:

> The names of persons who pass examinations for appointment to any position classified under the civil service shall be placed upon the eligible lists in the following order:
>
> (1) Disabled veterans as defined in section twenty-three A, in the order of their respective standing; (2) veterans in the order of their respective standing; (3) persons described in section twenty-three B in the order of their respective standing; (4) other applicants in the order of their respective standing. Upon receipt of a requisition, names shall be certified from such lists according to the method of certification prescribed by the civil service rules. A disabled veteran shall be retained in employment in preference to all other persons, including veterans.

Mass. Gen. Laws ch. 4, § 7, cl. 43 provides a general definition of the term veteran.

> "Veteran" shall mean any person, male or female, including a nurse, (a) whose last discharge or release from his wartime service, as defined herein, was under honorable conditions and who (b) served in the army, navy, marine corps, coast guard, or air force of the United States for not less than ninety days active service, at least one day of which was for wartime service, provided, that any person who so served in wartime and was awarded

> a service-connected disability or a Purple Heart, or who died in such service under conditions other than dishonorable, shall be deemed to be a veteran notwithstanding his failure to complete ninety days of active service.
>
> "Wartime service" shall mean service performed by a "Spanish War veteran", a "World War I veteran", a "World War II veteran", a "Korean veteran", a "Vietnam veteran", or a member of the "WAAC". . . .
>
> None of the following shall be deemed to be a "veteran":
>
> (a) Any person who at the time of entering into the armed forces of the United States had declared his intention to become a subject or citizen of the United States and withdrew his intention under the provisions of the act of Congress approved July ninth, nineteen hundred and eighteen.
>
> (b) Any person who was discharged from the said armed forces on his own application or solicitation by reason of his being an enemy alien.
>
> (c) Any person who was designated as a conscientious objector upon his last discharge or release from the armed forces of the United States.
>
> (d) Any person who has been proved guilty of wilful desertion.
>
> (e) Any person whose only service in the armed forces of the United States consists of his service as a member of the coast guard auxiliary or as a temporary member of the coast guard reserve, or both.
>
> (f) Any person whose last discharge or release from the armed forces is dishonorable.
>
> "Armed forces" shall include army, navy, marine corps, air force and coast guard.

"Active service in the armed forces", as used in this clause shall not include active duty for training in the army national guard or air national guard or active duty for training as a reservist in the armed forces of the United States.

Mass. Gen. Laws ch. 31, §§ 21 and 21A then add to the general definition provided in chapter 4.

Section 21 provides:

[t]he word "veteran" as used in this chapter shall mean: any citizen who: —

(a) Is a veteran as defined in clause Forty-third of section seven of chapter four, or (b) meets all the requirements of said clause Forty-third except that instead of performing wartime service as so defined he has been awarded one of the campaign badges enumerated in this section, or has been awarded the congressional medal of honor.

"Campaign badges" shall include the following and no other: —

Indian Campaign, Mexican Service, Mexican Border Service, Army of Cuban Occupation, Army of Puerto Rican Occupation, Nicaraguan Campaign nineteen hundred and twelve, Haitian Campaign nineteen hundred and fifteen, or nineteen hundred and nineteen and nineteen hundred and twenty, Dominican Campaign, Second Nicaraguan Campaign, Yangtze Service, Army of Occupation of Germany, China Service, Navy Occupation Service, Army of Occupation, or Medal for Humane Action.

Section 21A provides:

[f]or the purpose of this chapter only, the word "veteran" shall include any person who meets all the requirements of section twenty-one except that instead of performing ninety days' active service, including ten days' wartime service as so defined, he has performed active service in the armed forces of the United States at any time between April sixth, nineteen hundred and seventeen and November eleventh, nineteen hundred and eighteen, inclusive, or any person with active service in the armed forces at any time between September sixteenth, nineteen hundred and forty and June ninth, nineteen hundred and fifty-four, inclusive, who took an examination or filed an application on or before June ninth, nineteen hundred and fifty-four or who was on an existing civil service eligible list on said date.

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CAMPBELL, *Circuit Judge* (concurring). I join the opinion of the court, and wish only to reemphasize the limited reach of our holding. A state may lawfully enact legislation to benefit its veterans, and one way that it may do so is by giving them preference in the obtaining of public employment. But I see a basic distinction between giving veterans credit and even a headstart over other jobseekers on the one hand, and on the other giving them complete entitlement to the most desirable jobs, no matter what the competition. The Massachusetts veterans preference statute does the latter, and I therefore believe it goes too far, by creating a preference so absolute that all women, except the very few who are veterans, are effectively and permanently barred from all areas of civil service employment not shunned by men.

Admittedly the statute is not on its face gender-based, and I agree with Judge Murray that a state, in pursuit of its lawful objects, can go very far in enacting legislation that has an incidental impact upon persons of one gender. But surely if legislation has the effect of broadly excluding a constitutionally protected group such as women from opportunities normally open to all, there comes a point where courts must ask not only whether the state's aims are lawful but whether the means are permissible. Here I am of the opinion that the exclusionary impact is so total as to amount to a denial of equal protection under the fourteenth amendment. There are available to Massachusetts many other means for aiding and preferring its veterans which would not lead to a near blanket, permanent exclusion of all women from a major sector of employment.

LEVIN H. CAMPBELL,
Circuit Judge.

Murray, J. I concur in the opinion and judgment of the court in the *Anthony* case.

The court holds in the *Feeney* case that Mass. Gen. Laws ch. 31, § 23 is unconstitutional because it deprives women of equal protection of the laws. In reaching this result the court acknowledges that the Massachusetts Veterans' Preference statutory scheme "was not enacted for the purpose of disqualifying women from receiving civil service appointments," *ante* at 25, that the policy of "rewarding . . . those who have rendered public service as members of the military is a worthy state purpose," *id.* at 26, and that " . . . there is no constitutional right to public employment." *Id.* at 36. The court also declares that there is nothing in the Fourteenth Amendment that prohibits the state from "providing special treatment to veterans in considering candidates for public employment," *id.* at 28, and that such a state policy "responsibly recognizes both the special problems of veterans and the need to promote an important aspect of the nation's welfare." *Id.* at 29. I find nothing in the statutory scheme to support the supposition that the Commonwealth in furtherance of the legitimate state purposes referred to by the court has created a statutory classification which is either gender based or invidiously discriminates against women.

As justification for its holding, the court employs a means/end calculus to assess the constitutionality of the Veterans' Preference statute by analyzing the effect on women of its implementation. Using this analysis the court concludes that while the end of rewarding veterans is legitimate and rational, the means adopted by the statutory scheme to achieve the end are not. At the heart of the court's decision is the conclusion that there is justification in the equal protection clause for a court to exercise "its fundamental responsibility to ensure that all citizens are treated equally and fairly under the law." *Id.* at 30. This largely unobjectionable general statement of

justification can quite easily be read as authority for a court's displacement of every choice of classification made by a legislature.[1] Considerations of federalism and separation of powers, however, have disciplined the exercise of this "responsibility" by causing development by the Supreme Court of certain traditional principles for evaluation of equal protection challenges to state legislation. The central theme of the equal protection analysis developed by the Supreme Court has been the search for the proper standard of review by which to measure challenged legislation. I find in the court's opinion here with its means/end calculus neither sufficient concern for the institutional considerations militating against displacement of state legislation nor a fully articulated standard by which the legislature's choice of means should be evaluated. Having concluded that proper concern for the relevant considerations leads to a standard of review under which the legislation challenged in this case must be sustained, I respectfully dissent for the reasons stated below.

I.

In addressing an equal protection challenge to state legislation a court must be sensitive to the crucial institutional considerations which define its role as that of restraint when

[1] Professor Cox has noted, "[o]nce loosed the idea of Equality is not easily cabined." Cox, *The Supreme Court, 1965 Term — Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 Harv. L. Rev. 91 (1966). The equal protection clause has not been read, however, as a general warrant to rewrite legislation because some persons are treated differently from others in the classification schemes established by legislation. "Classification is inherent in legislation; the Equal Protection Clause has not forbidden it." *Morey* v. *Doud*, 354 U.S. 457, 472 (1957). (Frankfurter, J., dissenting).

called upon to interpose its judgment against the judgment of the political processes of the states. Justice Brennan has noted that "[t]he maintenance of the principles of federalism is a foremost consideration in interpreting any of the pertinent constitutional provisions under which [the Supreme] Court examines state action." *Allied Stores of Ohio* v. *Bowers*, 358 U.S. 522, 532 (1959) (Brennan, J., concurring). Principles of federalism are not merely a recognition "that our Constitution is an instrument of federalism," *id.*, but also a recognition of the value of state experimentation with a variety of means for solving social and economic problems. *Cf. New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). *See Younger* v. *Harris*, 401 U.S. 37 (1971) (Black, J., for the Court, for a discussion of "Our Federalism"). In approaching the legislation challenged here these principles require due recognition of the settled arrangements adopted by virtually every state legislature[2] — not to mention the Federal Government[3] — granting some form of veterans preference in public employment.

The doctrine of separation of powers requires that the courts give deference to the means by which the representative branches of government choose to implement state policies. Justice Harlan has succinctly summarized the dangers inherent in overly intrusive judicial review of legislation:

> It is said that there can be nothing wrong with courts exercising [active judicial review] because whatever they may do can always be undone by legislative enactment

[2] All but four states use a veterans preference in connection with public employment appointments. Brief for the Defendants at 34 n. 9 *Cf. Koelfgen* v. *Jackson*, 355 F. Supp. 243, 252 n. 9 (D. Minn. 1972), *aff'd mem.* 410 U.S. 976 (1973).

[3] 5 U.S.C. §§ 2108, 3309-12, 3316.

> or constitutional amendment . . . [But] in the end what would eventuate would be a substantial transfer of legislative power to the courts.

Harlan, *Thoughts at a Dedication: Keeping the Judicial Function in Balance*, 49 A.B.A.J. 943, 944 (1963).

The issue for the courts examining challenged legislation as Justice Douglas, speaking for the Court, put it in a case upholding a state statute which discriminated against men on the basis of gender as such,

> is not whether the statute could have been drafted more wisely, but whether the lines chosen by the . . . Legislature are within constitutional limitations. The dissents would use the Equal Protection Clause as a vehicle for reinstating notions of substantive due process that have been repudiated. "We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, [which] are elected to pass laws."

Kahn v. *Shevin*, 416 U.S. 351, 356 n. 10 (1974).

In weighing the separation of powers considerations inherent in any constitutional challenge to legislation "it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." *Missouri, K. & T. Ry.* v. *May*, 194 U.S. 267, 270 (1904) (Holmes, J.). It is therefore not inapposite to note in considering the challenge here that Congress has taken an active role in defining the applicability of the Fourteenth Amendment to gender discrimination in the employment context through Title VII of the Civil Rights Act of 1964.

42 U.S.C. § 2000e-2. Congress, however, has specifically chosen to protect veterans preference legislation from challenge under Title VII. 42 U.S.C. § 2000e-11.[4] To paraphrase Justice Brennan in *Frontiero* v. *Richardson*, 411 U.S. 677 (1973), the judgment of a coequal branch of government which has specifically addressed the issue of accommodating equal employment rights with veterans preference legislation is not without significance in evaluating the question presented in this case. *Id.* at 687-88.

II.

Guidance for judicial inquiry in an equal protection case is set out in *Dunn* v. *Blumstein*, 405 U.S. 330 (1972), where the Court said "we look, in essence, to three things: the character of the classification in question; the individual interests affected by the classification; and the governmental interests asserted in support of the classification." *Id.* at 335. The gravamen of plaintiff Feeney's complaint is that the statute and its implementation "unlawfully discriminate in public employment on the basis of sex." Para. 36. The Supreme Court, in recent cases, has defined sex discrimination as dissimilar treatment of men and women who are similarly situated. *Frontiero* v. *Richardson, supra*, at 688, citing *Reed* v. *Reed*, 404 U.S. 71, 77 (1974).

Treating the statutory classification first, it is obvious that the division between veterans and non-veterans is not drawn along sex lines and does not provide for dissimilar treatment for similarly situated men and women. On its face the statute is neutral, and, beyond that, there is no showing that the

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[4] *Cf.* EEOC, Decision 74-64, CCH Emp. Prac. Guide ¶ 6419.

statutory class distinctions "are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other. . .". *Geduldig* v. *Aiello*, 417 U.S. 484, 496-97 n. 20 (1974). The statute was not passed to disqualify women from civil service appointments, as the court has acknowledged. *Ante* at 25. If there exists the almost insuperable barrier to women attaining higher level civil service jobs, a result the court has found, it is a circumstance that non-veteran women share with a large number of non-veteran men.[5] This circumstance presents an even less compelling claim for sex discrimination than *Geduldig* v. *Aiello*, *supra*, where only women were in the group burdened by the classification.[6] I cannot assent to the supposition that plaintiff has shown the classification challenged here to be sex based or that

[5] The agreed statement of facts filed by the parties indicates that 852,000 male veterans and 16,000 female veterans reside in the Commonwealth. The agreed statement also indicates that approximately 1,990,000 males and 1,990,000 females over the age of 18 live in the Commonwealth. Anthony Statement ¶ 35. Based upon these figures, approximately 57 percent of the males over the age of 18 and 99 percent of the females over 18 in the Commonwealth are non-veterans.

[6] The court distinguishes *Geduldig* on the basis of the subject matter of the legislation challenged there — California's disability insurance program. *Ante* at 25 n. 8. But the principle teaching of *Geduldig* as I view it is the definition of sex discrimination. The Supreme Court's definition stated therein, as legislation that is either based on gender as such or invidiously discriminates against one or the other sex, has led one commentator who favors a much broader constitutional definition of sex discrimination to conclude that:

> the Court will not find states to be engaging in invidious discrimination in violation of the equal protection clause where they draw distinctions between men and women on the basis of traits exclusive and peculiar to one or the other sex.

Comment, Geduldig v. Aiello, *Pregnancy Classifications and the Definition of Sex Discrimination*, 75 Colum. L. Rev. 441, 442 (1975).

it invidiously discriminates against women.[7] Having reached that conclusion, I, like the court, find it unnecessary to address the question whether sex discrimination involves legislative creation of a suspect category.[8]

It is clear that plaintiff Feeney's interest at stake in the case is her interest in appointment to an administrative assistant position in the civil service. There is, to be sure, a due process dimension to the procedures by which the Commonwealth provides for the allocation of civil service jobs.[9] More

[7] The court states that "in the context of the Fourteenth Amendment '[t]he result, not the specific intent is what matters,'" *ante* at 29, citing six cases in support of that proposition. I find nothing in the cases cited, particularly in light of the teaching of *Geduldig* regarding the definition of sex discrimination, to justify an "impact" theory of discrimination here. *Cf. Smith* v. *Troyan*, 520 F. 2d 492 (6th Cir. 1975), *petition for cert. filed*, 44 U.S.L.W. 3360.

[8] A majority of the Supreme Court has not yet been found to declare sex discrimination a suspect classification. *Cf. Frontiero* v. *Richardson*, 411 U.S. 677, 682-88 (1973) (Brennan, J., for plurality contending sex is suspect classification). A majority of the Court has apparently not found it necessary to reach the question. *Cf. Stanton* v. *Stanton*, 421 U.S. 7, 13 (1975); *Smith* v. *Troyan*, 520 F. 2d at 495 n. 6.

[9] *See, e.g., Arnett* v. *Kennedy*, 416 U.S. 134 (1974); *Board of Regents* v. *Roth*, 408 U.S. 564 (1972); *Perry* v. *Sinderman*, 408 U.S. 593 (1972).

The court takes the position that the Fourteenth Amendment "demands that [a state providing public employment] must do so in a fair and equitable manner." *Ante* at 36 & n. 14. I do not read *Boston Chapter N.A.A.C.P., Inc.* v. *Beecher*, 504 F. 2d 1017 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975), and *Castro* v. *Beecher*, 459 F. 2d 725 (1st Cir. 1972), to mandate in a public employment context a more rigorous constitutional concept than is required by traditional equal protection analysis or by Title VII when applicable. As the court pointed out in *Feinerman* v. *Jones*, 356 F. Supp. 252:

> All of the cases which have talked of the need for compelling state interests in connection with state employment practices have either involved other constitutional rights, such as first amendment freedoms,

to the point for purposes of analysis of equal protection grounds, the basis on which the court rests its decision, is whether plaintiff's interest in public employment can be termed a "fundamental interest," a term having specific consequences for determination of the proper standard of federal review of the legislation. The Supreme Court in *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1 (1973), articulated the "key to discovering" whether an asserted individual interest can be viewed to be of such fundamental importance that unequal treatment of the interest under a state statute, absent a strong showing of justification, will require a federal court to strike down the legislation. The Court there stated that "the answer lies in assessing whether [the interest is] explicitly or implicitly guaranteed by the Constitution." *Id.* at 33-34, *see Shapiro* v. *Thompson*, 394 U.S. 618, 642 (1969) (Stewart, J., concurring). As the court here acknowledges, *ante* at 36, there is no constitutional right to public employment, and, therefore, under traditional equal protection analysis the plaintiff's interest cannot be viewed to be a "fundamental interest."

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or have dealt with the exclusion or dismissal of people from public employment on arbitrary grounds without proper due process procedures.

Id. at 258.

Plaintiff's due process argument that the statute is unconstitutional because it raises an irrebuttable presumption that non-veterans are not as qualified for civil service positions as are veterans is not persuasive. The doctrine of irrebuttable presumptions is directed at statutory schemes which raise evidentiary presumptions against a specific class. *See, e.g., Board of Educ.* v. *LaFleur*, 414 U.S. 632 (1974); *Vlandis* v. *Kline*, 412 U.S. 441 (1973). The due process objection to those presumptions is that they cannot be overcome by factual demonstration. The classification effected by the Veterans' Preference statute under attack here is of a different character. It does not represent an evidentiary assumption, rather it represents a policy choice of rewarding one class of citizens.

There are valid reasons which justify the Commonwealth's interest in creating a preference for veterans, that is, of providing special benefits to a class of persons deemed to have made special sacrifices for their country. In *Feinerman* v. *Jones*, 356 F. Supp. 252 (M.D. Pa. 1973) (three-judge court), the "underlying justifications" of upholding Veterans' Preference legislation were expressed:

> (1) As a recognition that the experience, discipline, and loyalty which veterans gain in military service is conducive to the better performance of public duties;
>
> (2) As a reward for those veterans who, either involuntarily or through enlistment, have served their country in time of war; and
>
> (3) As an aid in the rehabilitation and relocation of the veteran whose normal life style has been disrupted by military service. [Footnote omitted.]

Id. at 259. Other courts have held these reasons a valid basis for the statutory classification of veterans and non-veterans. *See Russell* v. *Hodges*, 470 F. 2d 212, 218 (2d Cir. 1972); *Koelfgen* v. *Jackson*, 355 F. Supp. 243 (D.C. Minn. 1972) (three-judge court), *aff'd mem.* 410 U.S. 976 (1973). *Cf. Hutcheson* v. *Director of Civil Service*, 361 Mass. 480 (1972).[10] There is nothing in the Fourteenth Amendment that precludes the granting of a preference to veterans who have initially passed a civil service examination.

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[10] *Johnson* v. *Robison*, 415 U.S. 361 (1974); *Mitchell* v. *Cohen*, 333 U.S. 411 (1948).

III.

Traditional equal protection analysis has presented a court with a choice of tests to determine the validity of challenged state legislation — restrained review and active review. *See generally, Developments in the Law — Equal Protection,* 82 Harv. L. Rev. 1065, 1076-1132. As the Supreme Court stated in *Weber* v. *Aetna Casualty & Surety Co.,* 406 U.S. 164, 172 (1972): "The tests to determine the validity of state statutes under the Equal Protection Clause have been variously expressed, but this Court requires, at a minimum, that a statutory classification bear some rational relationship to a legitimate state purpose." Active review — a strict standard of review under the Equal Protection Clause — which requires the state to show that the statutory classification was necessary to promote a "compelling state interest," is called for only when the discrimination is based on a classification of a suspect character or adversely affects a fundamental interest. The factual requirements calling for active review are not present and a more restrained standard of review should be applied here.[11]

Assuming *arguendo* that the statutory scheme challenged here is sex discrimination, plaintiff's claim should be tested by a standard of review which lies somewhere between restrained review and active review.[12] In *Reed* v. *Reed, supra,* where the classification in the statute was explicitly sex based, the standard articulated was that the challenged classification "must be reasonable, not arbitrary, and must rest upon some

[11] *See* Section II of this opinion *supra.*

[12] As more fully discussed in Section II, *supra,* I have concluded that this case does not involve sex discrimination. Accordingly, the standard of review I would employ here would be one even less demanding than that discussed in the text in Sections III and IV.

ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike." 404 U.S. at 76, citing *Royster Guano Co.* v. *Virginia,* 253 U.S. 412, 415 (1920). This traditionally deferential articulation of the standard has been applied in gender-based classification cases with a good deal more vigor than would normally be associated with restrained review. An intermediate standard has been articulated and applied in cases involving gender-based discrimination as embodying a requirement that the state show "a factually demonstrable distinction between the positions of the men and women affected by the classification which is substantially related to its objective." *Women's Liberation Union of Rhode Island* v. *Israel,* 512 F. 2d 106, 108 (1st Cir. 1975). *See also,* Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee — Prohibited, Neutral, and Permissive Classifications,* 62 Geo. L. J. 1071 (1974). Even assuming this case involves sex discrimination, based on the court's finding on the record here of nonintentional adverse discriminatory impact on women as a class, a less stringent standard of review than the demonstrable rational basis test is justified. *Cf. Castro* v. *Beecher,* 459 F. 2d 725, 733 (1st Cir. 1972).

IV.

In applying the demonstrable rational basis test to the case here, it should be recognized that the Veterans' Preference statute and the civil service regulations represent a fully considered "rough accommodation"[13] of the Commonwealth's

[13] The Veterans' Preference and the civil service scheme have been modified from time to time throughout their history and the Commonwealth has

interests which come into play when priorities are set for the allocation of a limited state resource. *Cf. San Antonio Independent School District* v. *Rodriguez*, 411 U.S. at 55. The scheme provides for identification through a test of the pool of applicants qualified to perform a specific job; it then arranges the qualified persons on an eligibility list in the order of their performance on the test. The statute provides that the names of persons who pass the examinations for appointment to a civil service position shall be divided into two classes: veterans and non-veterans. Those men and women placed in the veterans classification receive the benefit of the statute and those men and women not classed as veterans do not receive the benefit of the statute. The preference is integrated into the scheme by placing qualified veterans at the top of the eligibility list. The statutory scheme incorporates in two ways a policy of the Commonwealth that raw test score need not be the absolute measure of whether an individual should be chosen for a job. First, it provides certification to an appointing authority in order of appearance on the list of a number of persons greater than the number of jobs available, but leaves the appointing authority free to select a certified applicant irrespective of the applicant's test score; second, the scheme gives special advantage in placement on the list to qualified veterans.

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not been adverse to limiting the breadth of the preference. Brief for the defendants at 44-45. The Commonwealth's efforts to adjust the competing interests involved in civil service selection procedures are well illustrated by the disposition of the *Anthony* case. This change in the application of the Veterans' Preference is but a recent illustration of the Commonwealth's continuing efforts to accommodate the claims of diverse groups for the limited number of state jobs.

Where the clear purpose of the statute is to prefer qualified veterans for consideration for civil service jobs, analysis of the statutory scheme and the civil service regulations demonstrates that the classification at the very least substantially serves and furthers obvious state interests. To assert that the legislation "suspends the application of . . . job-related criteria and substitutes a formula that relegates demonstrable professional qualifications to a secondary position, absolutely and permanently," *ante* at 31, or that the Commonwealth has "incorporated into its public employment policy a set of criteria having no demonstrable relation to an individual's fitness for civilian public service," *ante* at 34, assumes the unacceptable premise that only selection criteria adhering exclusively and strictly to raw test score meet the standard of "demonstrable professional qualifications." Irrespective of whether the preference for veterans is applied in the selection of an applicant for a civil service job, the Commonwealth, as noted above, does deviate from the raw test scores in its selection procedures. The assertion that the preference is absolute and permanent is but another way of declaring that "the preference accorded to veterans is simply too great," *Rios* v. *Dillman*, 499 F. 2d 329, 332 (5th Cir. 1974), not that there is no rational basis for the classification.

The Commonwealth's Veterans' Preference statute is based on the factually demonstrable distinction of whether or not a person is a veteran. This classification is substantially related to the Commonwealth's purpose to benefit veterans in the area of public employment. The Commonwealth's choice of means to implement the purpose does not invidiously discriminate against women. The issue is whether the means chosen by the Commonwealth are within constitutional limitations, and as I believe they are I am unwilling to engage in speculation

regarding alternative measures[14] for achieving the statutory purpose. I would uphold the statute.

FRANK J. MURRAY,
United States District Judge.

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[14] A bonus point Veterans' Preference such as the one employed by the Federal Government, *ante* at 36-37 & n. 13, is one which would appear to have no practical effect of benefiting non-veteran women, like the plaintiff, seeking administrative assistant positions. After reordering the administrative assistant list, *see* Brief of the Plaintiffs at 235-38, to apply a bonus point preference system like the Federal system, it appears that the highest non-veteran woman would not be reached until at least eighteen names are certified from the list. Plaintiff would not be reached under such system until at least 31 names are certified. Since under civil service procedure the number of requisitioned positions would result in certification of no more than eleven names, no benefit would accrue under such bonus point system to non-veteran women generally and plaintiff in particular.

Appendix B.

United States District Court. District of Massachusetts.

HELEN B. FEENEY,
PLAINTIFF,

v.

THE COMMONWEALTH OF MASSACHUSETTS ET AL.,
DEFENDANTS.

CIVIL ACTION
No. 75-1991-T

Notice of Appeal to the Supreme Court of the United States.

Notice is hereby given that the Defendants, acting by and through their attorneys and pursuant to Supreme Court Rule 10, hereby appeal the judgment of this Court to the Supreme Court of the United States. In accordance with the provisions of Supreme Court Rule 10(2), the Defendants specify:

1. The parties taking the appeal are the Personnel Administrator of the Commonwealth (referred to as the Massachusetts Director of Civil Service in the pleadings) and the members of the Massachusetts Civil Service Commission, who are collectively referred to herein as the Defendants;

2. Defendants appeal from paragraph 3 of the Judgment and Order of the Court entered by Tauro, D.J., on March 29, 1976, and from the order enjoining Defendants from utilizing Mass. Gen. Laws c. 31, § 23 in any future selection of persons to fill civil service positions with the Commonwealth; and

3. Direct appeal to the Supreme Court of the United States is authorized by 28 U.S.C. 1253.

Respectfully submitted,

By Their Attorneys,

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Attorney General,
THOMAS R. KILEY,
Assistant Attorney General,
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Dated: May 25, 1976.

Appendix C.

Chapter 200.

THE COMMONWEALTH OF MASSACHUSETTS.

In the Year One Thousand Nine Hundred and Seventy-Six.

AN ACT SUSPENDING THE OPERATION OF THE VETERANS PREFERENCE LAW SO-CALLED, PENDING A DECISION OF THE UNITED STATES SUPREME COURT AND PROVIDING FOR THE ESTABLISHMENT OF A POINT SYSTEM OF PREFERENCE DURING SUCH SUSPENSION.

Whereas, The deferred operation of this act would tend to defeat its purpose, which is, in part, to maintain the system of veterans preference and to facilitate the system of public service in the commonwealth, therefore it is hereby declared to be an emergency law, necessary for the immediate preservation of the public safety and convenience.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. Section 23 of chapter 31 of the General Laws is hereby suspended until final judgment has been entered in the case of *Helen B. Feeney* v. *Commonwealth* which was brought in the United States District Court.

SECTION 2. Until the expiration of the period of suspension provided in section one, the grade received in a civil service examination by a disabled veteran or by the widow or widowed mother of a veteran who was killed in action or who died from service connected disability incurred in wartime

service shall be increased by ten points and the grade of other veterans as defined in section twenty-one of said chapter thirty-one shall be increased by five points. In any such examination in which experience is a factor in determining an applicant's grade or eligibility a veteran shall be given credit for service in the armed forces when his employment in a similar vocation to that for which he was examined was interrupted by service, and for all experience material to the position for which he was examined, including experience gained in religious, civic, welfare, service and organizational activities, regardless of whether he received pay therefor.

The names of applicants who have qualified in a competitive civil service examination shall be entered on their appropriate registers or list of eligibles in the following order:

For positions in Job Group XVII or higher in the salary and classification plan of the commonwealth or positions in the service of a city or town for which an equivalent salary has been established, in order of their rating, including points added under this section, and

For all other positions:

(A) disabled veterans who have a compensable service-connected disability of ten per cent or more, in the order of their ratings, including points added under this section; and

(B) remaining applicants, in the order of their ratings, including points added under this section.

The names of persons entitled to additional credit under this section shall be entered ahead of others having the same rating. A disabled veteran shall be retained in employment in preference to all other persons, including veterans.

SECTION 3. The provisions of this act shall apply to all eligible lists established as a result of an examination held prior to or after its effective date. Persons appointed from lists established under the provisions of this act during the period of suspension of section twenty-three of chapter thirty-one, as

provided in section one of this act, shall for all purposes be deemed to have been properly appointed under said chapter thirty-one, notwithstanding a decision in said case of *Helen B. Feeney* v. *Commonwealth* which may hold that the provisions of said section twenty-three are constitutional.

House of Representatives, June 14, 1976. Preamble adopted, THOMAS W. McGEE, Speaker.

In Senate, June 14, 1976. Preamble adopted, KEVIN B. HARRINGTON, President.

House of Representatives, June 15, 1976. Bill passed to be enacted, THOMAS W. McGEE, Speaker.

In Senate, June 15, 1976. Bill passed to be enacted, KEVIN B. HARRINGTON, President.

June 24, 1976.

Approved, 8 o'clock and 55 minutes, A.M.

MICHAEL S. DUKAKIS, Governor.

Appendix D.

United States District Court. District of Massachusetts.

HELEN B. FEENEY,
PLAINTIFF

v. CA 75-1991-T

THE COMMONWEALTH OF MASSACHUSETTS, ET AL.,
DEFENDANTS

Order

June 28, 1976.

TAURO, D.J.

1. The defendants' Motion for Relief from Judgment is DENIED.

2. The defendants' Supplemental Motion for Relief from Judgment is DENIED.

3. By agreement of counsel, no action is taken on defendants' Motion for a Stay of this court's Order and Judgment of March 29, 1976.

LEVIN H. CAMPBELL,
Circuit Judge.

FRANK J. MURRAY,
District Judge.

JOSEPH L. TAURO,
District Judge.

Appendix E.

Supreme Court of the United States.

No. A-36

MASSACHUSETTS,
APPELLANT
v.
HELEN B. FEENEY
APPELLEE

Order

UPON CONSIDERATION of the application of counsel for appellant,

IT IS ORDERED that the time for docketing an appeal in the above-entitled cause be, and the same is hereby, extended to and including August 23, 1976.

WILLIAM J. BRENNAN, JR.,
Associate Justice of the Supreme Court of the United States.

Dated this 20th day of July, 1976

2

Supreme Court, U. S.
FILED
SEP 22 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-265

THE COMMONWEALTH OF MASSACHUSETTS, ET AL.,
Appellants,

v.

HELEN B. FEENEY,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

MOTION TO DISMISS OR AFFIRM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-265

THE COMMONWEALTH OF MASSACHUSETTS, ET AL.,
Appellants,

v.

HELEN B. FEENEY,
Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16 of the Rules of this Court, Helen B. Feeney moves that the appeal by the Attorney General of the Commonwealth of Massachusetts be dismissed. In the alternative, Helen B. Feeney moves that the judgment of the district court be affirmed.

QUESTIONS PRESENTED

Does the Attorney General of the Commonwealth of Massachusetts have standing to file an appeal in this Court from a final judgment in an action in which he is not a party to the record and in which the parties to the record have expressly directed him not to file an appeal?

Does Mass. Gen. Laws c. 31, § 23, which excludes women from civil service positions by granting a permanent and absolute preference to veterans, violate the Fourteenth Amendment to the Constitution of the United States?

STATEMENT

This is a direct appeal by the Attorney General of the Commonwealth of Massachusetts from a final judgment and order of a three-judge district court holding Mass. Gen. Laws c. 31, § 23, unconstitutional in that it operates to deprive female civil service applicants of equal protection of the laws and permanently enjoining the Director of Civil Service and members of the Civil Service Commission from utilizing Mass. Gen. Laws c. 31, § 23, in the selection of persons to fill civil service positions. The state's veterans' preference formula, conceded by the Attorney General to be unique to Massachusetts (J.S. 15), operates predictably and systematically as an absolute bar to the employment of women in public service jobs of the Commonwealth of Massachusetts, except for lower-level, lower-paying positions for which males have traditionally not applied.

The plaintiff in this action is Helen B. Feeney, a female resident of the Commonwealth of Massachusetts, who, as a result of application of the state's veterans' preference formula, was excluded from consideration for a number of civil service positions for which she had applied. (J.S. 12a-14a)

Named as defendants in this action in the district court were the Commonwealth of Massachusetts, the Division of Civil Service of the Commonwealth of Massachusetts, Edward W. Powers, as Director of Civil Service, and Nancy B. Beecher, Wayne A. Budd, Joseph M. Duffy, Richard J.

Healy and Helen C. Mitchell, as members of the Civil Service Commission.[1]

The case was heard upon an agreed statement of facts which is summarized in the opinion of the district court. (J.S. 3a) On March 29, 1976, the district court entered an order and opinion granting judgment in favor of Helen B. Feeney against the named individual defendants.[2] (J.S. 1a)

On May 25, 1976, the Attorney General of Massachusetts filed a Notice of Appeal to the Supreme Court of the United States on behalf of the Personnel Administrator of the Commonwealth and the members of the Massachusetts Civil Service Commission and sought a stay of the judgment and order from which the appeal was taken. The parties filed in the district court a stipulation[3] as to the following facts:

(1) Defendants Kountze and the members of the Civil Service Commission, individually and in their official capacities, have not authorized and are opposed to the appeal from the district court's order.

(2) The defendants have formally requested that no appeal be filed on their behalf by the Attorney General.

(3) The defendants have asked the Attorney General of Massachusetts to appoint a Special Assistant Attorney General to represent their interests in all further proceedings in this case.

---

[1] The position of Director of Civil Service has been eliminated and his duties transferred to the Personnel Administrator of the Commonwealth who is presently Wallace Kountze. The members of the Civil Service Commission are presently Amelia Miclette, Wayne A. Budd, John Donegan, Richard J. Healy, and Richard Linden.

[2] The Commonwealth of Massachusetts and the Division of Civil Service were dismissed as parties on the grounds that they were not "persons" within the meaning of 42 U.S.C. § 1983.

[3] The stipulation is reproduced as Appendix A to this Motion.

(4) The Governor of Massachusetts, the Honorable Michael S. Dukakis, in his official capacity as Chief Executive Officer of the Commonwealth, is opposed to an appeal from the judgment of the district court and has requested the Attorney General not to file an appeal on behalf of the defendants.

On August 23, 1976, the Attorney General of Massachusetts filed a Jurisdictional Statement in this Court which purported to be submitted on behalf of the Personnel Administrator of the Commonwealth and the members of the Massachusetts Civil Service Commission.[4]

ARGUMENT

I. The Appeal Should Be Dismissed Because No Party to the Record and Judgment of the District Court Has Authorized an Appeal to This Court.

The appeal should be dismissed under Rule 16 of this Court in that it has not been taken in conformity to statute or to the rules of this Court. The Attorney General of Massachusetts has not been authorized to prosecute an appeal to this Court by any party to the record and judgment of the district court, nor was he himself a party to that record. He therefore lacks standing to prosecute this appeal.

The Attorney General has invoked the jurisdiction of this Court pursuant to 28 U.S.C. § 1253, which states that

[4] In a letter dated September 1, 1976, addressed to the Clerk of this Court, Wallace H. Kountze and Amelia Miclette, as Chairman of the Civil Service Commission, informed this Court that "the appeal is without our authorization" and that the jurisdictional statement was filed "without our consent and contrary to our express requests." The letter concluded: "Therefore, pursuant to 28 U.S.C. Section 1654, and acting in our own behalf as all of the parties appellant to this appeal, we request that the Court dismiss the appeal."

". . . any *party* may appeal to the Supreme Court. . ." (emphasis added).[5] The Attorney General is not a party. He was the attorney for the parties in the district court, but attorneys cannot file appeals in federal courts unless authorized by a party. *Brown* v. *Grand Trunk Western R. Co.*, 124 F.2d 1016 (6th Cir. 1941); *cf. Pueblo of Santa Rosa* v. *Fall*, 273 U.S. 315 (1927). None of the parties to the record and judgment of the district court, all of whom are public officials of the executive branch of the Commonwealth of Massachusetts responsible to its Governor, have authorized the Attorney General to appeal on their behalf. Appendix A, *infra*, 1a-4a.

These defendants have a federal right to conduct their own cases personally and to represent their own particular interests. 28 U.S.C. § 1654 ("In all courts of the United States the parties may plead and conduct their own cases personally . . . ."). Both the defendants and the Governor specifically requested the Attorney General not to file an appeal on behalf of the defendants. Appendix A, *infra*, 1a-4a.

These requirements of statute and rule reflect a concern for the orderly administration of the federal judiciary and for the "case or controversy" requirement of Article III. It has long been settled by this Court that "[o]ne who is not a party to a record and judgment is not entitled to appeal therefrom." *In the Matter of Leaf Tobacco Board of Trade*, 222 U.S. 578, 581 (1911); *South Carolina* v. *Wesley*, 155 U.S. 542 (1895); *Bayard* v. *Lombard*, 50 U.S. (9 How.) 530 (1850). The established federal rules are no different

[5] This Court's own Rules relating to jurisdiction on appeal contemplate that "parties to the proceeding in the court from whose judgment the appeal is taken shall be deemed parties in this court . . . ." See Rule 10(4) and, generally, Rules 10-16. See also *United Auto Workers* v. *Scofield*, 382 U.S. 205, 208-209 (1965) ("Under § 1254(1) of the Judicial Code, only a 'party' to a case in the Court of Appeals may seek review here.")

for attorneys general seeking to represent the general interests of a state. *United States ex. rel. Louisiana* v. *Jack,* 244 U.S. 397 (1917); see also *United States* v. *Seigel,* 168 F.2d 143 (D.C. Cir. 1948).

This Court need not and should not discard settled principles of judicial proceeding in federal courts to extricate the Attorney General from the position in which he finds himself: he represents no party to the record and judgment below who has invoked this Court's jurisdiction.

The Attorney General cannot rest his right to appeal on authority conferred by Mass. Gen. Laws c. 12, § 3.[6] (J.S. 1) Claims of authority to proceed in federal court based on state law are inappropriate ". . . in the face of the long term perfectly settled law that equity suits in federal courts and the appellate procedure in them are regulated exclusively by federal statutes and decisions unaffected by statutes of the States." *United States ex rel. Louisiana* v. *Jack, supra,* 244 U.S. at 403.

Moreover, this statute does not authorize the Attorney General to represent the state or any of the public officials of either the executive or legislative branch of state government in tribunals other than the courts of Massachusetts unless he is expressly requested to do so by the governor or the legislature. In this case, the Governor has expressly requested the Attorney General *not* to represent, or file an appeal on behalf of, the public officers of the executive branch who are the parties to the record.[7] While the legislative branch of state government has passed resolutions[8] generally exhorting the Attorney General to appeal, those resolutions fall far short of an express directive to the Attorney General to disregard the will of the executive branch, through its Governor, and to file an appeal on behalf of the executive officers who are parties to the record.[9] All that the legislative branch has done in this case is pass general precatory resolutions which on their face are not binding on anyone, even the Attorney General.

Parties in federal courts represent ascertainable interests which determine standing to invoke federal jurisdiction under Article III of the Constitution. The filing of an appeal on behalf of executive branch officials, contrary to their express desire and contrary to the express desire of the

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[6] This statute is reproduced in Appendix B to this Motion.

[7] This is not a case of lower echelon public officials defying the will of lawful superiors. The defendants are officials of the executive branch of the Commonwealth of Massachusetts, responsible to the Governor who is the "supreme executive magistrate." Part II, c. 2, § 1, art. 1 of the Constitution of Massachusetts. The Governor opposes the appeal. Thus, it is the policy determination and will of the executive branch of the state government, through its Governor, to whom the parties to the record are responsible, that there be no appeal.

[8] Both houses of the state legislature passed virtually identical resolutions on April 6, 1976. The operative portion of the resolution of the Massachusetts Senate was:

> "*Resolved,* That the Massachusetts Senate hereby respectfully urges the Attorney General of the Commonwealth to appeal the decision rendered by said federal court in said case of *Feeney* v. *Commonwealth, et al,* with all due vigor and to its final judgment by the Supreme Court of the United States . . . ."

[9] Under these circumstances, there is no need for this Court to resolve the difficult questions which would be presented not only under Mass. Gen. Laws c. 12, § 3, but also under the Massachusetts Constitution, Part II, c. 2, § 1, art. 1, if there were a conflict between the chief executive and the legislature over the direction and control of the litigation decisions of executive branch officials in federal court. Cf. *United States* v. *Nixon,* 418 U.S. 683, 693 (1974) ("[T]he Executive has exclusive authority and absolute discretion to decide to prosecute a case.").

executive branch, is an act contrary to their specific interests. If the Attorney General believed that state law gave either him or the legislature an interest sufficient for federal court jurisdiction, he should have moved to intervene as a party.[10] As it stands, there is no party who has invoked this Court's jurisdiction. The appeal should be dismissed.

II. The Decision of the District Court Should Be Affirmed.

A. The District Court Correctly Applied the Standard of Judicial Scrutiny Appropriate for Constitutional Review of a Statute That Discriminates Against Women.

This case involves a state statute which, by granting a lifetime, absolute preference to veterans, foreseeably and systematically bars virtually all women of the state "from all areas of civil service employment not shunned by men." (J.S. 34a) (Campbell, J., concurring) The district court found that the veterans' preference formula used by Massachusetts in making appointments to state civil service positions, given the virtual exclusion of women from the armed services, "inescapably" leads to the denial to women of any meaningful opportunity to compete for these jobs, without regard to their demonstrable professional qualifications. (J.S. 26a)

This finding has two major premises. First, women, as a class do not benefit from the veterans' preference formula. As the district court noted: "Facially, the Veterans'

[10] The interests of a legislature are easily protected under available federal procedures. The legislature could have sought to intervene in this action. If the legislature had a sufficient interest to permit it to become a party, the Attorney General could have appealed on its behalf. See, *e.g.*, *Sixty-Seventh Minnesota State Senate* v. *Beens*, 406 U.S. 187 (1972).

Preference is open to both men and women. But to say that it provides an equal opportunity for both men and women to achieve a preference would be to ignore reality." (J.S. 27a) As a result of the deliberate exclusion of women from the military, few women are veterans, and few will become veterans so as to qualify for the preference. Second, the preference is absolute. "Eligible veterans, regardless of qualifications relative to eligible non-veterans, have the public employment field cleared for them on an absolute and permanent basis." (J.S. 24a)

The district court termed "disastrous" the impact of veterans' preference on the employment opportunities of women in Massachusetts. (J.S. 27a) Women are effectively barred from all but low-paying jobs shunned by men. "Few, if any, females have ever been considered for the higher positions in the state civil service." (J.S. 26a)

The absolute preference thus guarantees the perpetuation of centuries of discrimination against women. See *Frontiero* v. *Richardson*, 411 U.S. 677, 684-685 (1973). It has produced a civil service workforce which has two distinct classes of employees: one is male and occupies the higher-paying, higher-grade, policy-making positions in Massachusetts government; the other is female and occupies the lower-paying, lower-grade positions, such as clerk and secretary, for which men traditionally have not applied.

In passing on the constitutional validity of the state's veterans' preference formula, the district court expressly employed the standard of judicial scrutiny formulated in *Reed* v. *Reed*, 404 U.S. 71 (1971) and consistently applied by this Court in cases involving sex discrimination. (J.S. 19a-20a) See *Stanton* v. *Stanton*, 421 U.S. 7 (1975); *Weinberger* v. *Wiesenfeld*, 420 U.S. 636 (1975); *Schlesinger* v. *Ballard*,

419 U.S. 498 (1975); *Kahn* v. *Shevin*, 416 U.S. 351 (1974); *Frontiero* v. *Richardson*, 411 U.S. 677 (1973). The standard of review employed in these cases requires less than strict judicial scrutiny but more than the passive review inherent in the "mere rationality" test. The district court's use of this intermediate standard was clearly correct.[11]

The near-total exclusion of women which necessarily results from the veterans' preference formula requires the same standard of review as the limited statutory preference of men over women at issue in *Reed* v. *Reed*, *supra*. Heightened judicial scrutiny is particularly appropriate where, as here, the challenged classification produces a wholesale denial of equal access to employment in a major sector of the state's economy. *Truax* v. *Raich*, 239 U.S. 33 (1915); cf. *Hampton* v. *Mow Sun Wong*, — U.S. —, 96 S. Ct. 1895, 1905 (1976).

Moreover, this is the standard of review apt for statutes which impose legal burdens and penalties on a whole class of women, through no fault or choice of their own, and which are ". . . contrary to the basic concept of our system that legal burden should bear some relationship to individual responsibility or wrongdoing." *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972).

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[11] *Massachusetts Board of Retirement* v. *Murgia*, — U.S. —, 96 S. Ct. 2562 (1976), is inapposite. That case dealt with a legislative classification based on age, a condition which this Court noted "marks a stage that each of us will reach if we live out our normal span." *Id.* at 2567. It does not stand for the proposition, as the Attorney General suggests, that minimal scrutiny should be applied to classifications that discriminate against women. The Court in *Murgia* did not purport to overrule *Reed* v. *Reed*, *supra*, or the line of cases that follow it, or to abandon the application of its standard of review in appropriate cases. Indeed, four days after its decision in *Murgia*, this Court applied the *Reed* standard in *Mathews* v. *Lucas*, — U.S. —, 96 S. Ct. 2755 (1976). Nor does *Murgia* signal an abandonment by this Court of its recognition of "the severity or pervasiveness of the historic legal and political discrimination against women. . . ." *Mathews* v. *Lucas*, *supra*, at 2762.

Applying the test articulated in *Reed*, the district court, while recognizing the legitimacy of the state's objective, addressed "[t]he crucial question . . . whether [the statute] advances that objective in a manner consistent with the command of the Equal Protection Clause." *Reed* v. *Reed*, *supra*, at 76. This necessarily involved examination of the suitability of the particular means chosen by the state to achieve its objective. See, *e.g.*, *Frontiero* v. *Richardson*, *supra*; *Police Dept. of Chicago* v. *Mosley*, 408 U.S. 92 (1972); *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972); *Turner* v. *Fouche*, 396 U.S. 346 (1970); *Andrews* v. *Drew Municipal Separate School District*, 507 F.2d 611 (5th Cir.), *cert. granted*, 423 U.S. 820 (1975).

In reviewing the means selected by the Massachusetts legislature to assist veterans, the district court properly and, indeed, necessarily considered the availability of alternatives to the absolute preference. The court noted that an absolute preference is not the only means by which the state could assist veterans in the area of public employment. It emphasized that "Massachusetts has considerable flexibility in the manner in which it can aid its veterans." (J.S. 28a) Given the availability of alternative methods of assisting Massachusetts veterans which would not absolutely and permanently disadvantage the women of Massachusetts, the district court was correct in concluding that there was no legitimate or rational reason for the state's adoption of an absolute preference, and that the statute was, therefore, unconstitutional.

Affirmance of the decision of the district court would not invalidate the preferences granted to veterans by other states or the federal government. The district court based

its decision on the narrow ground that the *absolute* preference of veterans within the context of the Massachusetts civil service system necessarily excludes women from significant employment opportunities. The district court explicitly indicated that the system of preference used by the federal government (and, in fact, by virtually all other states) would not necessarily have the same infirmity.

B. The Decision of the District Court is Consistent With Washington v. Davis.

The recent decision by this Court in *Washington* v. *Davis,* — U.S. —, 96 S. Ct. 2040 (1976), does not impair the soundness of the decision of the district court. In *Washington* v. *Davis, supra,* this Court held that a statute, designed to serve neutral ends, is not unconstitutional *solely* because it has a disproportionate impact on one class of persons. (J.S. 9-11) A careful scrutiny of the deliberate use in Mass. Gen. Laws, c. 31, § 23, of a non-neutral selection criterion that operates foreseeably and systematically to bar women as a class from public employment jobs in Massachusetts reveals that the judgment of the district court is wholly consistent with the standards set forth in *Davis.*

While the Attorney General does not dispute the severity of the impact upon women caused by the state's use of a lifetime, absolute preference for veterans,[12] he ignores the

[12] "Few, if any, females have even been considered for the higher positions in the state service." Opinion of the district court. (J.S. 26a)

"[A]ll women, except the very few who are veterans, are effectively and permanently barred from all areas of civil service employment not shunned by men." Concurring Opinion of Circuit Judge Campbell. (J.S. 34a)

fact that the preference statute is, by design, not neutral and erroneously characterizes the district court's judgment as based "solely" on its impact. (J.S. 10)

In marked contrast with the neutral purpose and effect of the employment test before this Court in *Washington* v. *Davis, supra,*[13] the Veterans' Preference Act, Mass. Gen. Laws, c. 31, § 23, is manifestly designed not to apply neutrally to all persons. Rather, as the district court found, it "is a deliberate, conscious attempt on the part of the state to aid one clearly identifiable group of its citizens, those who qualify as veterans, by giving them an absolute and permanent preference in public employment". (J.S. 21a) This non-neutral end necessarily "succeeds at the absolute and permanent disadvantage of another clearly identifiable group, Massachusetts' women," (J.S. 21a) producing "a near blanket, permanent exclusion of all women from a major sector of employment." (J.S. 34a) (Campbell, J., concurring) This is akin to the "wholesale" deprivation of eligibility for public employment to a "discrete class of persons" found to warrant constitutional scrutiny in *Hampton* v. *Mow Sun Wong,* — U.S. —, 96 S. Ct. 1895 (1976).

The wholesale discrimination against women which was found by the district court to result from the Massachusetts veterans' preference statute is purposeful and deliberate,

[13] This Court was faced in *Davis* with a challenge to the use of a neutral test of verbal skills which the district court found was not "culturally slanted" to favor whites and which was "neither designed nor operated to discriminate against otherwise qualified blacks." The test had been "designed to serve neutral ends" and only served to require all applicants to meet a uniform minimum standard of communicative skills. The Court of Appeals found the test unconstitutional based *solely* on the statistically disproportionate impact of the test on blacks. This Court reversed because disproportionate impact, while not irrelevant, is not the "sole touchstone" of a discrimination forbidden by the Constitution. On the facts, this Court held that the impact did not warrant the conclusion that the test was "a purposeful device to discriminate". *Washington* v. *Davis, supra,* 96 S. Ct. at 2051.

regardless of whether the discrimination was the express or principal purpose of the statute. Besides finding a disproportionate impact, the district court found additionally that the exclusion of women was "inescapable". (J.S. 9a) The district court recognized that "decades of restrictive federal enlistment regulations" prevented women from becoming veterans. (J.S. 20a) By preferring veterans absolutely, the state necessarily excludes virtually all women from employment and renders the operation of the statute "anything but an impartial, neutral policy of selection, with merely an incidental effect on the opportunities for women."[14] (J.S. 20a)

State officials, like all responsible actors, are considered to intend the "natural and foreseeable consequences" of their actions. As Mr. Justice Stevens observed in his concurring opinion in *Washington* v. *Davis, supra,* 96 S. Ct. at 2054:

> "Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds. This is particularly true in the case of governmental action which is frequently the product of compromise, of collective decisionmaking, and of mixed motivation."

This familiar doctrine has frequently been invoked where intent is a requisite element in a discrimination claim. See, *e.g., NLRB* v. *Great Dane Trailers,* 388 U.S. 26, 33 (1967) (discrimination in violation of § 8(a)(3) of the National Labor Relations Act); *United States* v. *Texas Ed. Agency,* 532 F.2d 380, 388-389 (5th Cir. 1976). Similarly, in *Monroe*

[14] This Court in *Washington* v. *Davis, supra,* reaffirmed the proposition that disproportionate impact combined with the use of "non-neutral selection procedures" would be sufficient to make out a *prima facie* case of purposeful discrimination warranting constitutional scrutiny. 96 S. Ct. at 2048.

v. *Pape,* 365 U.S. 167, 187 (1961), this Court rejected specific intent as an element of a cause of action under 42 U.S.C. § 1983 and held that it "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions."

In light of the foregoing, it is clear that Massachusetts' relegation of women to a position of inferiority in the selection process for public service jobs is purposeful within the meaning of this Court's decision in *Washington* v. *Davis, supra.* Thus, the district court's decision is wholly consistent with the constitutional standards articulated in that case.

CONCLUSION

For the reasons stated herein and by the district court, the appeal should be dismissed. Alternatively, the judgment of the district court should be affirmed.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

HELEN B. FEENEY, *Plaintiff* v. THE COMMONWEALTH OF MASSACHUSETTS, et al., *Defendants*	CIVIL ACTION NO. 75-1991-T

STIPULATION

The parties in this action stipulate and agree to the following facts, without conceding the materiality or relevance thereof:

1. Wallace H. Kountze is the Personnel Administrator of the Division of Personnel Administration of the Commonwealth and a defendant in this action.

2. In his official capacity as Personnel Administrator of the Commonwealth, a defendant in this action and individually, Mr. Kountze has not authorized and opposes an appeal from the judgment of this Court to the United States Supreme Court.

3. In his official capacity as Personnel Administrator of the Commonwealth, a defendant in this action and individually, Mr. Kountze has not authorized and opposes the filing on his behalf by the Attorney General of the Notice of Appeal, the Motion for Stay of Judgment, the Motion for

Relief from Judgment and the Supplementary Motion for Relief from Judgment now pending before the Court.

4. After reviewing the judgment and order of this Court entered on March 29, 1976, Mr. Kountze wrote to the Attorney General on March 31, 1976, requesting that no appeal be filed on his behalf. (A true copy of that letter is attached hereto as Exhibit A.) He has stated in an affidavit previously filed with this Court that he did not request the filing of the motion for a stay and the motion for relief from judgment.

5. Mr. Kountze was not consulted by the Attorney General prior to the filing of the documents referred to in paragraph 3, above, nor was Mr. Kountze at any time consulted by the Attorney General concerning the effect that the granting or denial of any of these motions would have on the administration of the civil service system of the Commonwealth. Counsel for the Division of Public Administration has consulted with the office of the Attorney General on these matters and has informed that office that the granting of these motions would cause some difficulty in the administration of the civil service system.

6. In a letter dated May 27, 1976 from Amelia Miclette, Chairperson of the Civil Service Commission to the Attorney General, the Attorney General was asked to appoint a Special Assistant Attorney General to represent Mr. Kountze and the members of the Civil Service Commission in all further proceedings in this action. (A true copy of this letter is attached hereto as Exhibit B.)

7. The Attorney General has not met with Mr. Kountze personally to discuss his opposition to a stay and to an appeal, or his reasons therefor, or to discuss his request that his interests be represented by a Special Assistant Attorney General.

8. Given the Attorney General's filing of the Notice of Appeal and the motions described in paragraph 3 over Mr. Kountze's objection, Mr. Kountze wishes to be represented by a Special Assistant Attorney General in all further proceedings in this action.

9. The individual members of the Civil Service Commission in their official capacities as members of the Commission and as they collectively comprise the Commission are defendants in this action.

10. The members of the Civil Service Commission in their official capacities, as they comprise the Commission, and as defendants in this action, have not authorized and oppose an appeal from the judgment of this court to the United States Supreme Court.

11. The members of the Civil Service Commission, in their official capacities, as they comprise the Commission, and as defendants in this action, have not authorized and oppose the filing on their behalf by the Attorney General of the Notice of Appeal, the Motion for Stay of Judgment, the Motion for Relief from Judgment and the Supplemental Motion for Relief from Judgment.

12. After reviewing the judgment and order of this Court entered on March 29, 1976, the Civil Service Commission voted on March 31, 1976 to request the Attorney General not to appeal on behalf of the Civil Service Commission and its individual members. The Attorney General was informed of this request by letter dated March 31, 1976 from Amelia L. Miclette, Chairperson of the Civil Service Commission. (A true copy of this letter is attached hereto as Exhibit C.)

13. None of the defendant members of the Civil Service Commission were personally consulted by the Attorney

General after May 25, 1976 concerning any of the matters which are now pending before the Court.

14. As of June 21, 1976, the Attorney General had not met with the members of the Civil Service Commission to discuss their opposition to a stay and to an appeal, or their reasons therefor, or to discuss their request that their interests be represented by a Special Assistant Attorney General.

15. Given the Attorney General's filing of the Notice of Appeal and the motions described in paragraph 11 over their objection, the members of the Civil Service Commission wish to be represented by a Special Assistant Attorney General in all further proceedings in this action.

16. The documents, attached hereto, marked "A," "B," "C," and "D" are true copies of letters to the Attorney General from and on behalf of the defendants set forth therein.

17. The Governor of the Commonwealth of Massachusetts is Michael S. Dukakis. The Governor in his official capacity as the chief executive officer of the Commonweatlh opposes the filing of an appeal from the judgment of the Court in this action and the motion for a stay and the various other motions filed by the Attorney General on behalf of the defendants who are officials of the executive branch of government of the Commonwealth. The basis for the Governor's opposition is that such actions are not in the interests of the defendants or the Commonwealth and its citizens or otherwise in the public interest. The Governor has requested the Attorney General not to file an appeal on behalf of the defendants and, through his counsel, not to seek a stay, reconsideration or modification of the Court's judgment and order. On June 21, 1976, the Governor, through his counsel, requested the Attorney General to

appoint a Special Assistant Attorney General to represent the defendants in all further proceedings in this action.

18. The list of persons constituting a list of eligible persons certified for appointment to the fire department of Boston has since May 28, 1976 been supplemented by the names of additional eligibles. There is at least one woman who is eligible for appointment to the Boston Fire Department who has not yet been certified to the appointing authority but who in the opinion of Wallace H. Kountze, the Personnel Administrator will be at some time in the future certified for appointment.

19. In the opinion of Wallace H. Kountze, the Personnel Administrator for the Commonwealth, no confusion or difficulty in the administration of the Division of Personnel Administration of the Commonwealth has resulted from compliance with the Court's order heretofore entered in this action.

THE PLAINTIFF By her attorney,	THE DEFENDANTS By FRANCIS X. BELLOTTI, *Attorney General*
JOHN REINSTEIN 68 Devonshire Street Boston, Massachusetts 02109	THOMAS R. KILEY *Assistant Attorney General* One Ashburton Place Boston, Massachusetts 02108

June 21, 1976

EXHIBIT "A"

THE COMMONWEALTH OF MASSACHUSETTS
Executive Office for Administration and Finance
One Ashburton Place, Boston 02108
OFFICE OF THE PERSONNEL ADMINISTRATOR

March 31, 1976

HONORABLE FRANCIS X. BELLOTTI
Attorney General
Room 373
State House
Boston, Massachusetts 02133

Dear Attorney General Bellotti:

As the Personnel Administrator of the Commonwealth, the statutory successor to the Director of Civil Service (c. 835 of the Acts of 1974), I have read the opinion and order in the Veterans' Preference cases (*Anthony* v. *Commonwealth; Feeney* v. *Commonwealth*) and it is my opinion that the matter should not be appealed to the Supreme Court of the United States. Accordingly, I request that you, as my legal representative pursuant to M. G. L. c. 12, s. 3, not file an appeal on my behalf.

Sincerely,

WALLACE H. KOUNTZE
Personnel Administrator

WHK:km

EXHIBIT "B"

THE COMMONWEALTH OF MASSACHUSETTS
Executive Office for Administration and Finance
One Ashburton Place, Boston, Ma. 02108
CIVIL SERVICE COMMISSION

May 27, 1976

ATTORNEY GENERAL FRANCIS X. BELLOTTI
Office of the Attorney General
20th Floor, One Ashburton Pl.
Boston, Mass. 02108

Re: Helen B. Feeney, *Plaintiff*
v.
The Commonwealth of Massachusetts, Et Al,
Defendants

Dear General Bellotti:

I write you on behalf of the members of the Civil Service Commission and the Administrator of the Division of Personnel Administration, Wallace H. Kountze, all defendants in the above captioned matter.

We have been advised that your office has undertaken steps to seek a stay of judgment in this case in the United States District Court for the District of Massachusetts as well as to appeal the matter to the United States Supreme Court. While we recognize your legal right to take these actions, we nevertheless remain opposed to both the stay and the appeal. Therefore, we strongly believe that we are in need of legal counsel to represent our interests and a formal request is hereby made for the appointment of a

Special Assistant Attorney General to act as our Counsel in these proceedings.

The matter is of such grave concern and importance to us, and our need for counsel is so pressing, that we seek the opportunity to meet with you as soon as possible to discuss the ramifications of our position.

We await hearing from you in this regard at the earliest possible time.

Very truly yours,

AMELIA L. MICLETTE, *Chairperson*
Civil Service Commission

ALM:rf
CC: WALLACE H. KOUNTZE, *Personnel Administrator*

EXHIBIT "C"

THE COMMONWEALTH OF MASSACHUSETTS
Executive Office for Administration and Finance
One Ashburton Place, Boston, Ma. 02108
CIVIL SERVICE COMMISSION

March 31, 1976

FRANCIS X. BELLOTTI
Attorney General
Office of the Attorney General
State House, Room 373
Boston, Massachusetts 02133

RE: Carol A. Anthony, et al.
v.
The Commonwealth of
Massachusetts, et al.

Helen B. Feeney
v.
The Commonwealth of
Massachusetts, et al.

Dear Attorney General Bellotti:

At its meeting of March 31, 1976, the Civil Service Commission voted that:

1) The Commission recognizes and appreciates the interest of individual veterans, their associations, and their representatives in having the above named decision appealed to a higher court. However, the Commission is unwilling to be a party to such an appeal.

2) The Commission believes that the most appropriate course of action at the present time is for the legis-

lature to enact an alternative procedure to provide preference for veterans along the line spelled out in the decision of the federal court.

3) Accordingly, the Commission requests the Attorney General that no appeal be made in this matter in the name of the Civil Service Commission and its individual members.

Should you decide to pursue further the matter of the appeal, the Commission would respectfully request the opportunity to meet with you in order to share its views in this regard.

Sincerely,

AMELIA L. MICLETTE, *Chairperson*
Civil Service Commission

ALM:jz
cc: SECRETARY JOHN R. BUCKLEY
WALLACE H. KOUNTZE
Personnel Administrator

EXHIBIT "D"

THE COMMONWEALTH OF MASSACHUSETTS
Executive Office for Administration and Finance
State House, Boston 02133

March 31, 1976

THE HONORABLE FRANCIS X. BELLOTTI
Attorney General of the Commonwealth
John W. McCormack Building
One Ashburton Place
Boston, Massachusetts 02108

Dear Attorney General Bellotti:

I have reviewed the opinion and order of the Court in the cases of *Anthony et al* v. *Commonwealth of Massachusetts et al* (CA 74-5061-T) and *Feeney* v. *Commonwealth of Massachusetts et al* (CA 75-1991-T), the so-called Veterans' Preference cases, and have concluded that the matter does not merit further judicial review. Accordingly, I would support the requests of both the Personnel Administrator and the Civil Service Commission, forwarded to you herewith, that you not appeal this case to the Supreme Court of the United States.

I am aware that the decision to enjoin utilization of Veterans' Preference has an impact on the state's personnel system which I have the ultimate responsibility of overseeing. The delay and uncertainty caused by an appeal might well further complicate administration of that system. Accordingly, my office has already begun to work with the Legislature to formulate legislation which would further the legitimate governmental interest of rewarding veterans while not working to the permanent and absolute disadvantage of the women of the Commonwealth.

Sincerely yours,

JOHN R. BUCKLEY
Secretary

JRB:j

APPENDIX B

Mass. Gen. Laws c. 12, § 3:

"The attorney general shall appear for the commonwealth and for state departments, officers and commissions in all suits and other civil proceedings in which the commonwealth is a party or interested, or in which the official acts and doings of said departments, officers and commissions are called in question, in all the courts of the commonwealth, except upon criminal recognizances and bail bonds, and in such suits and proceedings before any other tribunal, including the prosecution of claims of the commonwealth against the United States, when requested by the governor or by the general court or either branch thereof. All such suits and proceedings shall be prosecuted or defended by him or under his direction. Writs, summonses or other processes served upon such officers shall be forthwith transmitted by them to him. All legal services required by such departments, officers, commissions and commissioners of pilots for district one in matters relating to their official duties shall, except as otherwise provided, be rendered by the attorney general or under his direction."

3

Supreme Court, U.S.
FILED
OCT 8 1976
... DODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-265

THE COMMONWEALTH OF MASSACHUSETTS, ET AL.,
APPELLANTS,

v.

HELEN B. FEENEY,
APPELLEE.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Brief in Opposition to the Motion to Dismiss or Affirm of the Appellee and Opposition to the Motion for Leave to File an Amicus Curiae Brief of John R. Buckley, Secretary of Administration and Finance of the Commonwealth of Massachusetts

FRANCIS X. BELLOTTI,
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ALAN K. POSNER,
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BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS.

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In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-265

THE COMMONWEALTH OF MASSACHUSETTS, ET AL.,
APPELLANTS,

v.

HELEN B. FEENEY,
APPELLEE.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Brief in Opposition to the Motion to Dismiss or Affirm of the Appellee and Opposition to the Motion for Leave to File an Amicus Curiae Brief of John R. Buckley, Secretary of Administration and Finance of the Commonwealth of Massachusetts

Preliminary Statement

Two documents have been filed with this Court suggesting that the appeal from the judgment of the United States District Court for the District of Massachusetts was improperly docketed and should be dismissed. Both documents assert that the Attorney General of the Commonwealth of Massachusetts,

who was the attorney of record for all defendants in the district court and whose relationship with the defendants is governed by state law,[1] could not prosecute an appeal without the consent of the state officers who are the nominal appellants.[2] The first such document is a motion to dismiss or affirm filed by the attorneys for Helen B. Feeney, which contains argument not only on the authority of the Attorney General, but also on the merits of the appeal. The second document contains no argument on the merits of the appeal. It contains both a motion for leave to file an amicus curiae brief prior to consideration of the jurisdictional statement and the brief itself. The Attorney General of the Commonwealth, as he is counsel to the appellants in this matter, did not assent to the motion to file an amicus curiae brief and, pursuant to Supreme Court Rules 16(4) and 42(3), hereby opposes both the motion to dismiss and the motion for leave to file an amicus curiae brief. Because the reasons for opposition are substantially the same, appellants submit one brief opposing both motions.

[1] The obligation of the Attorney General to defend the Commonwealth and its officers is both a common law and statutory obligation. *Secretary of Administration and Finance* v. *Attorney General*, 1975 Mass. Adv. Sh. 665, 326 N.E. 2d 334 (1975); *cf. Ford Motor Co.* v. *Department of Treasury*, 323 U.S. 459 (1945). The pertinent statute, Mass. Gen. Laws c. 12, § 3, is set forth as Appendix A to this brief.

[2] The issue of the authority of the Attorney General acting on behalf of the named defendants to take an appeal to fully defend an allegedly unconstitutional state statute was raised in the court below as part of plaintiffs' opposition to the state defendants' motions for post judgment relief. In addition to the stipulation reproduced as an appendix in both the motion to dismiss and motion for leave to file an amicus brief, the district court had before it the affidavit of Attorney General Francis X. Bellotti which is reproduced and set forth as Appendix B to this brief. The issue was briefed by the appellee and rebutted orally by appellants. The district court made no written findings on the question.

Argument

Contrary to the position taken by the appellee, the Attorney General has properly appealed on behalf of the named defendants. He has taken this appeal in order to defend the constitutionality of a state statute. The state law of Massachusetts plainly supports his action, and no principle of federal law stands in opposition.

The named defendants in this case are the Personnel Director and the members of the Civil Service Commission of Massachusetts. They were sued under the well-established principles of *Ex parte Young*, 209 U.S. 123 (1908). Because the named defendants are the state officers directed by the Massachusetts Legislature to implement the provisions of the challenged statute, Mass. Gen. Laws c. 31, § 23, they are the only officials capable of effectuating the injunctive relief sought. They were therefore the only appropriate parties defendant in the district court. *Ceballos* v. *Shaughnessy*, 352 U.S. 599, 603 (1957).

The relevant state law makes plain that named defendants have no role in this litigation other than that prescribed by *Ex parte Young*. They possess no discretion either in deciding whether or not the challenged statute will be enforced, in selecting counsel to represent them in litigation, or in determining the strategy that will be followed during litigation. The necessity under *Ex parte Young* that individual, named officials be sued in order to attack the constitutionality of a statute is entirely separate from the question of what course counsel will follow in defending the statute during the course of the proceedings. Such decisions are reserved to the Attorney General, and the personal wishes of appointive officials, although important, cannot carry any formal weight.

Because the relationship between the nominal defendants and the Attorney General is fixed by state law, the arguments of the appellee premised on the normal, private attorney-client relationship have no place here.[3] Massachusetts law leaves no question on this point. The Attorney General alone is authorized by statute to appear for the Commonwealth, its officers and agencies in actions commenced in state courts. Mass. Gen. Laws c. 12, § 3. The views of the ministerial officers who are named as defendants, while often followed and always considered,[4] are not controlling on the decision of the Attorney General who is charged with the formulation and implementation of a consistent statewide legal policy. Thus, the Supreme Judicial Court of the Commonwealth has held that the Attorney General may properly refuse to prosecute an appeal even when the involved agency or officer desires that an appeal be taken. *Secretary of Administration and Finance*

[3] Such cases as *Cord* v. *Smith*, 338 F. 2d 516 (9th Cir. 1964), and *First Iowa Hydro Elec. Coop.* v. *Iowa-Illinois Gas & Elec. Co.*, 245 F. 2d 630 (8th Cir. 1957), dealing exclusively with the private attorney-client relationship, are of dubious precedental value on the issue presented by the motion to dismiss.

[4] The appellee and amicus would suggest that in this case the Attorney General has refused to consider the recommendations of the nominal defendants and has abused his discretion by failing to appoint a Special Assistant Attorney General. However, the affidavit reproduced as Appendix B indicates that there was full consideration of those views and constant communication between the Department of the Attorney General and agents for the Personnel Director and Civil Service Commission. Furthermore, appointment of a Special Assistant Attorney General, when the Attorney General was vigorously defending the statute, would have been inimical to the duty to implement a consistent legal policy for the Commonwealth. *Secretary of Administration and Finance* v. *Attorney General*, 1975 Mass. Adv. Sh. 665, 326 N.E. 2d 334 at n. 8. *See, also, Nugent ex rel. Collins* v. *Vallone*, 91 R.I. 145, 161 A. 2d 802 (1960); *Rincon Band of Mission Indians* v. *Escondido Mutual Water Co.*, 459 F. 2d 1082 (9th Cir. 1972).

v. *Attorney General*, 1975 Mass. Adv. Sh. 665, 326 N.E. 2d 334 (1975). While it is true that this case deals with the converse of that situation, the language of the opinion leaves no doubt about the proper interpretation of state law and its application to the facts of the case at bar:

> Although we agree that the canons permit the client to make such decisions where the traditional attorney-client relationship exists, a careful reading of G.L. c. 12, § 3, its legislative history and the history of the office of Attorney General compel us to conclude that something other than that traditional attorney-client relationship exists where the Attorney General "appears for" an officer, department head or secretary pursuant to c. 12. We hold that the Attorney General, as "chief law officer of the Commonwealth," *Commonwealth* v. *Kozlowsky*, 238 Mass. 379, 389, 131 N.E. 207, 212 (1921), has control over the conduct of litigation involving the Commonwealth, and this includes the power to make a policy determination not to prosecute the Secretary's appeal in this case. . . .
>
> *The Attorney General represents the Commonwealth as well as the Secretary, agency or department head who requests his appearance.* G.L. c. 12, § 3. He also has a common law duty to represent the public interest. . . . Thus, when an agency head recommends a course of action, the Attorney General must consider the ramifications of that action on the interests of the Commonwealth and the public generally, as well as on the official himself and his agency. To fail to do so would be an abdication of official responsibility. . . . 326 N.E. 2d 334 at 336, 338. (Emphasis added.)

It is of central importance that, in the words of the Supreme Judicial Court, "[t]he Attorney General represents the Commonwealth," whether or not the Commonwealth is actually named as a party in the litigation. The appellee suggests, in direct contradiction to the Supreme Judicial Court, that the Attorney General represents the Commonwealth *only* if the Commonwealth is a named defendant; otherwise, argues the appellee, the Attorney General is subordinated to the wishes of the official actually named as the defendant, whoever that may be. Specifically, the appellee has implied that if the district court had not dismissed the Commonwealth as a named defendant,[5] then the Attorney General's appeal would be proper. However, the Attorney General's representation of the Commonwealth and its interests as contemplated by state law cannot be made to turn on whether the Commonwealth is named by the plaintiffs as a defendant. Such a result would subordinate the authority of the Attorney General under state law to the vagaries of the plaintiffs' pleadings. This court should reject an argument which would make the state's ability to defend its statutes turn on either the form of the pleadings or the personal desires of appointive executive officials who have no constitutional or statutory role in the law-making process.

The authority of the Attorney General to appeal on behalf of the officers of the Commonwealth in federal court extends, under the provisions of Mass. Gen. Laws c. 12, § 3, to all matters "when requested by the governor *or* by the general court or either branch thereof" (emphasis added). In this

[5] The Commonwealth and Division of Civil Service were dismissed as parties to this case because they are not "persons" within the meaning of 42 U.S.C. § 1983. The appellee suggests that, in choosing to assert a proper defense under § 1983, the Attorney General sacrificed control of the course of the litigation. This is a dangerous proposition, and appellants have found no federal court decision which supports it.

particular instance, formal resolutions adopted by both branches of the Legislature were overwhelmingly passed on April 6, 1976.[6] Any doubt that the Attorney General is the proper officer to represent the named defendants and decide to appeal the adverse decision of the district court is removed by the existence of those formal resolutions. Thus, if the question presented is resolved with reference to state law, this case has been properly docketed and the motion to dismiss and motion for leave to file an amicus brief should be denied.

Counsel for the appellee and amicus suggest, however, that it is inappropriate to look to the law of Massachusetts and that, under the rules of this Court as well as the provisions of 28 U.S.C. § 1253, only the named parties can authorize an appeal to this Court. Even the cases they cite, however, involve consideration and contain discussion of state law. In *United States ex rel. Louisiana* v. *Jack*, 244 U.S. 397 (1917), this Court refused to allow the Attorney General of Louisiana to appeal in a case involving the sale of land by the Tensas Basin Levee District Board of Commissioners, a creature of the Louisiana Legislature with power to sue and be sued. The State Supreme Court held that as a matter of state law neither Louisiana nor the Attorney General were proper parties to challenge that sale, and this Court noted, "This decision determining the effect of the state statutes . . . is accepted as conclusive by this court . . . unless it has been modified by statute [or] . . . modifying decision." *Id.* at 402.

Similarly, the authority of an Attorney General to appear in federal courts on behalf of state officials has been decided in part by reference to state law in cases such as *Sixty-Seventh Minnesota State Senate* v. *Beens*, 406 U.S. 187 (1972) (power of Minnesota Attorney General to intervene on behalf of the State Senate in an apportionment case); *State ex rel. Shevin* v.

[6] The resolution of the House of Representatives appears as Appendix C to this brief and that of the Senate as Appendix D.

Exxon Corp., 526 F. 2d 266 (5th Cir. 1976) (power of the Florida Attorney General to institute suits under federal law in the name of governmental entities without specific authorization); *Wade* v. *Mississippi Cooperative Extension Service*, 392 F. Supp. 229 (N.D. Miss. 1975) (power of the Mississippi Attorney General to represent a state agency despite the agency's desire to proceed with counsel of their own choosing).

Application of the principles of federalism compel the conclusion that the Attorney General, acting pursuant to state law, is the proper state official to decide whether or not to pursue the instant appeal. The individual defendants are named in this case in part on the basis of the salutary "fiction" which lies at the heart of *Ex parte Young*, 209 U.S. 123 (1908). Although the Eleventh Amendment and doctrine of sovereign immunity might have theoretically prohibited cases like this at one time, it is now clear that such a suit may be brought against a state officer, even though both the purpose and effect of the action are to attack the constitutionality of a legislative policy.

In this case the *Ex parte Young* principle permits plaintiffs to attack the veterans' preference statute on its face, without a direct confrontation between the federal court and the State Legislature. Plaintiffs would have the *Ex parte Young* technique for avoiding such confrontation become a vehicle for shutting this Court's door to the defense of a state statute the Legislature obviously supports strongly.[7]

[7] The resolutions appended hereto as Appendices C and D respectively are not the only evidence of the importance the Legislature has attached to veterans' preference. Since the first veterans' preference statute took effect in Massachusetts in 1887, some form of preference has continuously existed. Indeed, even after the district court enjoined the implementation of Mass. Gen. Laws c. 31, § 23, in this case, the Legislature passed an interim statute designed to operate during the pendency of this appeal. Mass. St. 1976, c. 200 (Jurisdictional Statement, App. C).

Plaintiffs' position, if adopted, would insure existence of the very "needless friction with state policies"[8] that this Court has sought to put aside.

In this case, the roles of the named defendants in implementing the legislative policy of preference for veterans are ministerial in nature. They are directed by statute to utilize this preference in the hiring process and are without authority to administratively reverse, modify, or disregard the law. Similarly, neither the Governor nor the Secretary of Administration and Finance could circumvent the normal lawmaking processes and effectively repeal the statute because they happen to disagree with it. *Ex parte Young* provides a vehicle for opening the judicial process to persons who otherwise could not obtain redress for perceived constitutional wrongs. That vehicle should not now be perverted to deny the Commonwealth, through the Attorney General, an opportunity to defend itself when its statutes are assailed.

Conclusion

In this case, the Attorney General, by law, represents the named defendants. The jurisdictional statement is filed in their names by their attorney. Thus, this appeal has been docketed in conformity with the rules of this Court and 28

[8] *Railroad Commission of Texas* v. *Pullman Co.*, 312 U.S. 496, 500 (1941).

U.S.C. § 1253. For all these reasons, it is submitted that this Court should deny both the motion to dismiss filed by the counsel to the appellee and the motion for leave to file an amicus curiae brief.

Respectfully submitted,

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ALAN K. POSNER,
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(617) 727-2205

Attorneys for Appellants.

Appendix A

GENERAL LAWS, CHAPTER 12.

§ 3. [Appearances for commonwealth, prosecution or defense; rendering of legal services]

The attorney general shall appear for the commonwealth and for state departments, officers and commissions in all suits and other civil proceedings in which the commonwealth is a party or interested, or in which the official acts and doings of said departments, officers and commissions are called in question, in all the courts of the commonwealth, except upon criminal recognizances and bail bonds, and in such suits and proceedings before any other tribunal, including the prosecution of claims of the commonwealth against the United States, when requested by the governor or by the general court or either branch thereof. All such suits and proceedings shall be prosecuted or defended by him or under his direction. Writs, summonses or other processes served upon such officers shall be forthwith transmitted by them to him. All legal services required by such departments, officers, commissions and commissioners of pilots for district one in matters relating to their official duties shall, except as otherwise provided, be rendered by the attorney general or under his direction.

Appendix B

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

HELEN B. FEENEY,
PLAINTIFF,

v.

THE COMMONWEALTH OF MASSACHUSETTS ET AL.,
DEFENDANTS.

CIVIL ACTION
No. 75-1991-T

Affidavit

I, Francis X. Bellotti, on oath depose and say that I am the duly elected Attorney General of the Commonwealth and as such, I am the chief law officer of the Commonwealth. I have read the Stipulation submitted to this Court on June 22, 1976 and consider it to be inaccurate in the sense that it omits the following relevant facts:

1. On or about April 13, 1976, I met with the Personnel Administrator and the Chairperson of the Civil Service Commission to discuss their views concerning an appeal to this Court's decision. While it is true that I personally had no further discussion with the nominal defendants concerning issues related to appeal prior to filing the Notice of Appeal with this Court, it is inaccurate to suggest that there was no communication between offices.

2. On information and belief, I state that there was frequent, perhaps daily, oral communication between John

Burrill, Counsel for the Personnel Administrator and the Civil Service Commission, and attorneys from the Department of the Attorney General. Furthermore, I caused letters to be sent to Mr. Burrill concerning the application for a stay on May 19, 1976 and June 2, 1976. Also on information and belief, I state that there was oral communication concerning the subject motions between Catherine White and Daniel Taylor of the Governor's legal staff and attorneys for the Department of the Attorney General.

3. Normal communication between by office and state agencies is through counsel. It would have been a radical departure from the norm had there been repeated personal contact between the named defendants in this case and me.

4. I fully considered the views of the Governor and the nominal defendants in this case before making any decision to appeal the judgment of this Court to the Supreme Court of the United States and have weighed their interests prior to filing the subject motions. In the final analysis, after an exhaustive deliberative process, I am persuaded that my primary responsibility is to duly enacted legislation and, particularly in light of the April 6, 1976 resolution of the Senate and House of Representatives, I have filed a notice of appeal.

5. The desire of the Governor for special counsel was first made known to me on June 22, 1976. The request of the Civil Service Chairman was made on May 27, 1976 and has never been refused. I remain available to discuss these matters and all other legal business of the Commonwealth with the Governor, Personnel Administrator, and Civil Service Commission.

FRANCIS X. BELLOTTI
Attorney General

Then personally appeared the above-named Francis X. Bellotti before me and made oath that the above statements are true to the best of his knowledge and belief.

DIANNE L. CUNIO
Notary Public

My commission expires: June 20, 1980

Appendix C

THE COMMONWEALTH OF MASSACHUSETTS

In The Year One Thousand Nine Hundred and Seventy-Six

RESOLUTIONS REQUESTING THE ATTORNEY GENERAL OF THE COMMONWEALTH TO APPEAL THE FEDERAL COURT DECISION DECLARING CERTAIN VETERANS PREFERENCE LAWS OF THE COMMONWEALTH UNCONSTITUTIONAL.

Whereas, The United States District Court, sitting as a three judge court, in a two to one decision, rendered in the case entitled *Helen B. Feeney v. Commonwealth of Massachusetts, et al.*, Civil Action No. 75-1991-T, which declared the Massachusetts General Laws, chapter thirty-one, section twenty-three, unconstitutional, and enjoined the Massachusetts Civil Service Director and the members of the Massachusetts Civil Service Commission from utilizing said law in any future selection of persons to fill civil service positions with the commonwealth; and

Whereas, The rights of eight hundred thousand veterans within the Commonwealth, particularly those veterans who served in the Vietnam conflict, are adversely affected by said decision which can only be appealed by the Attorney General of the Commonwealth, thereby giving these citizens their day in court; now therefore, be it

Resolved, That the Massachusetts House of Representatives hereby respectfully urges the Attorney General of the Commonwealth to appeal the decision rendered by said federal

court in said case of *Feeney v. Commonwealth, et al.*, with all due deliberate speed and to its final judgment by the Supreme Court of the United States; and be it further

Resolved, That copies of these resolutions be transmitted forthwith by the Clerk of the House of Representatives to the Attorney General of the Commonwealth.

House of Representatives, adopted, April 6, 1976.

THOMAS W. McGEE
SPEAKER OF THE HOUSE

WALLACE C. MILLS
CLERK OF THE HOUSE

WILLIAM F. HOGAN

Offered by: REPRESENTATIVE WILLIAM F. HOGAN

Appendix D

THE COMMONWEALTH OF MASSACHUSETTS

In The Year One Thousand Nine Hundred And Seventy-Six

RESOLUTIONS REQUESTING THE ATTORNEY GENERAL OF THE COMMONWEALTH TO APPEAL THE FEDERAL COURT DECISION DECLARING CERTAIN VETERANS PREFERENCE LAWS OF THE COMMONWEALTH UNCONSTITUTIONAL.

Whereas, The United States District Court, sitting as a three judge court, in a two to one decision, rendered a decision in the case entitled *Helen B. Feeney v. Commonwealth of Massachusetts, et al.*, Civil Action No. 75-1991-T, which declared the Massachusetts General Laws, chapter thirty-one, section twenty-three, unconstitutional, and enjoined the Massachusetts Civil Service Director and the members of the Massachusetts Civil Service Commission from utilizing said law in any future selection of persons to fill civil service positions with the commonwealth; and

Whereas, Said decision, as stated in the dissent thereto, was a flagrant abuse of the doctrine of the separation of powers in that two federal judges have interposed the federal court in between the will of the people of the commonwealth and the expression of that will by the making of laws by its elected representatives; and

Whereas, The rights of eight hundred thousand veterans within the commonwealth, particularly those veterans who served in the Vietnam conflict, are adversely affected by said

decision which can only be appealed by the Attorney General of the Commonwealth, thereby giving these citizens their day in court; now therefore, be it

Resolved, That the Massachusetts Senate hereby respectfully urges the Attorney General of the Commonwealth to appeal the decision rendered by said federal court in said case of *Feeney v. Commonwealth, et al,* with all due vigor and to its final judgment by the Supreme Court of the United States; and be it further

Resolved, That copies of these resolutions be transmitted forthwith by the Clerk of the Senate to the Attorney General of the Commonwealth.

Senate, adopted, April 6, 1976.

KEVIN B. HARRINGTON
PRESIDENT OF THE SENATE

EDWARD B. O'NEILL
CLERK OF THE SENATE

ARTHUR H. TOBIN

Offered by: SENATOR ARTHUR H. TOBIN

MOTION FILED
SEP 22 1976

In the Supreme Court of the United States.

OCTOBER TERM, 1976.

No. 76-265.

THE COMMONWEALTH OF MASSACHUSETTS ET AL.,
APPELLANTS,

v.

HELEN B. FEENEY,
APPELLEE.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

Motion for Leave to File Amicus Curiae Brief in Opposition to Jurisdiction, and Brief of John R. Buckley, Secretary of Administration and Finance of the Commonwealth of Massachusetts, in Opposition to Jurisdiction.

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PROCEDURAL RULES.

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In the Supreme Court of the United States.

OCTOBER TERM, 1976.

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HELEN B. FEENEY,
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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

Motion for Leave to File Amicus Curiae Brief in Opposition to Jurisdiction, and Brief of John R. Buckley, Secretary of Administration and Finance of the Commonwealth of Massachusetts, in Opposition to Jurisdiction.

Motion.

John R. Buckley, Secretary of Administration and Finance of the Commonwealth of Massachusetts, respectfully moves this Court for leave to file the accompanying brief in this case as *amicus curiae*. The consent to such brief of the attorneys for the appellee has been obtained, and the consent of all of the parties appellant has been obtained, which consents

are attached hereto and marked Appendix A. However, the consent of the Attorney General of Massachusetts has been refused. Having received the consent of all parties, the applicant believes that he has complied with Rule 42(1). However, should applicant be mistaken in this belief, then he respectfully urges the Court to grant its leave to the filing of the accompanying brief.

The applicant, John R. Buckley, has an interest in this case in that he is the chief fiscal and personnel officer of the Commonwealth. Mass. Gen. Laws c. 7, §§ 4, 4A. The division of personnel administration and the civil service commission, the two parties appellant, are by law under the direction, control and supervision of the applicant. Mass. Gen. Laws c. 7, § 4. Further, this motion and accompanying *amicus curiae* brief are filed with the knowledge and approval of the Governor of the Commonwealth and of the parties appellant.

The accompanying brief argues that there is no jurisdiction under 28 U.S.C. § 1253 for the Court to hear this appeal since it has been filed by the Attorney General of Massachusetts, not a party to the judgment below, without the authorization of either appellant party and contrary to their express requests that no such appeal be filed. On March 31, 1976, both parties appellant informed the Attorney General of their request that this case not be appealed. On May 27, 1976, the appellants reiterated their request that no appeal be taken. The Governor of the Commonwealth and the applicant have also both requested the Attorney General not to appeal this case. These requests are all included in a stipulation, attached hereto and marked Appendix B, signed by the Attorney General and filed with the United States District Court,

District of Massachusetts, in the matter below.[1] In a letter to the Court's clerk, dated September 1, 1976, both parties appellant acting in their own behalf pursuant to 28 U.S.C. § 1654[2] requested that the Court dismiss this appeal. A copy of such letter is attached and marked Appendix C. The Attorney General has denied every request of the parties appellant that this appeal not be taken, and the applicant therefore believes that argument on the question of jurisdiction for this appeal will be inadequate.

If the Court agrees with the argument presented in the attached brief, then it must dismiss the appeal for want of jurisdiction under 28 U.S.C. § 1253 and for noncompliance with Rule 10.

Respectfully submitted,

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Chief Legal Counsel to the Governor,
RODERICK L. IRELAND,
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(617) 727-2065
Attorneys for Amicus Curiae.

[1] At an earlier stage of the proceedings the Commonwealth of Massachusetts and the Division of Civil Service were parties defendant, but at the request of the Attorney General such parties were dropped and judgment entered in their favor by order of the District Court on March 29, 1976. *See*, Jurisdictional Statement, p. 6.

[2] "In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein." 28 U.S.C. § 1654.

In the Supreme Court of the United States.

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Amicus Curiae Brief of John R. Buckley, Secretary of Administration and Finance of the Commonwealth of Massachusetts, in Opposition to Jurisdiction.

Interest of Amicus Curiae.

The interest of *amicus curiae* is set forth in the accompanying Motion for Leave to File Amicus Curiae Brief. In summary, John R. Buckley, as Secretary of Administration and Finance, is the chief fiscal and personnel officer of the Commonwealth, he directs, controls and supervises the activities of the officials who are parties appellant to this appeal, and he is filing this brief with the knowledge and approval of such parties and of the Governor of the Commonwealth.

Further Question Presented.

In the Attorney General's Jurisdictional Statement previously filed with this Court a single constitutional question is stated (p. 4). *Amicus curiae* believes a threshold statutory question raising the Court's jurisdiction in this appeal is also presented: Is jurisdiction for appeal conferred by 28 U.S.C. § 1253 when all of the parties appellant have expressly requested that the Attorney General of Massachusetts, not a party to the judgment below, take no appeal?

Argument.

28 U.S.C. § 1253[3] Permits Only Parties to Appeal and does Not Confer Jurisdiction for Appeals by Non-Parties Even If they have Some Interest in the Proceeding.

The record is clear beyond question that the parties appellant, in whose name the Attorney General has filed this appeal, in fact do not wish to appeal this case. As the Attorney General's own stipulation (attached as Appendix B) states, both parties appellant have not authorized and oppose this appeal (*infra*, paragraphs 2 and 10, at pp. 2a and 4a). The Attorney General did not consult with either party prior to filing the notice of appeal (*infra*, paragraphs 5 and 13, at pp. 3a and 5a-6a). Nor did he meet with either party to discuss their opposition to the appeal, or their request that a Special Assistant Attorney General represent their interests (*infra*, paragraphs 7 and 14, at pp. 3a, 4a and 5a). Further, the Governor of the Commonwealth opposes the appeal, has

[3] "Except as otherwise provided by law, any *party* may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges." (Emphasis added.) 28 U.S.C. § 1253.

requested the Attorney General not to file such appeal, and has requested the appointment of a Special Assistant Attorney General to represent the parties appellant in this matter (*infra*, paragraph 17, at p. 5a). Upon the filing of a Jurisdictional Statement by the Attorney General, the parties appellant acted on their own behalf pursuant to 28 U.S.C. § 1654 to request that the Court dismiss this appeal (attached as Appendix C).

There being no appeal authorized by the parties appellant in this case, and an appeal having been taken in their name but over their express protest, the Attorney General of Massachusetts is seeking, in effect, to appeal on behalf of a *non-party* — the Commonwealth of Massachusetts.

It has been well settled law for over one hundred years that appeals in the federal courts may only be taken by parties to the judgment below. *Bayard* v. *Lombard*, 9 How. 530, 551, 13 L. Ed. 245, 254 (1850); *South Carolina* v. *Wesley*, 155 U.S. 542, 545 (1895); *United States ex rel. Louisiana* v. *Jack*, 244 U.S. 397, 402 (1917); *United States* v. *Seigel*, 168 F. 2d 143, 144 (D.C. Cir. 1948) (cases cited therein). It is equally well settled that attorneys themselves, unless they become parties, may not appeal. As the Court of Appeals held in *First Iowa Hydro Elec. Coop.* v. *Iowa-Illinois Gas & E. Co.*, 245 F. 2d 630, 631 (8th Cir. 1957), when it dismissed an unauthorized appeal by attorneys who were not parties:

> Under the Federal Rules of Civil Procedure, appeals cannot be taken from final judgments of the District Court otherwise than by parties to the judgments. Rule 73 provides that "a party may appeal from a judgment by filing with the district court a notice of appeal." The four attorneys were not parties and they neither asked nor obtained leave to become parties. We know of no appeal by non-parties.

Elsewhere that court noted: "We think the plaintiffs may not be made appellants against their will." 245 F. 2d at 632. *See, Pueblo of Santa Rosa* v. *Fall*, 273 U.S. 315 (1927); *Meredith* v. *Ionian Trader*, 279 F. 2d 471 (2d Cir. 1960). The Attorney General of Massachusetts is not a party in this case.

The courts of the United States have rigorously applied these rules and dismissed unauthorized appeals involving state agencies. Thus, in *Brown* v. *Grand Trunk Western R. Co.*, 124 F. 2d 1016 (6th Cir. 1941), the attorney general of Michigan engaged special counsel to represent the auditor general of Michigan. Without the consent and over the protest of the state officials, the special counsel sought to appeal on behalf of the auditor general. The court dismissed the appeal as unauthorized, holding that:

> [t]he general rule is that an attorney cannot, on his own motion, appeal from a judgment or decree injuriously affecting the interest of his client without said client's consent. 124 F. 2d at 1016.

Even where states have been the real parties in interest, though the actual parties to the record have been state agencies, the Court has never relaxed its rule that only the parties to the record may authorize appeals. In *Louisiana* v. *Jack*, *supra*, a state attorney general, dissatisfied with the settlement of an action in the United States District Court by a state agency which he represented, sought to intervene and appeal on behalf of the state. As an alternative holding in affirming the Court of Appeals' denial of the attorney general's petition, the Court stated:

> With exceptions not even remotely applicable to a case such as we have here it has long been the law as settled by this court that "no person can bring a writ of error (an appeal is not different) to reverse a judgment who is not a party or privy to the record," *Bayard* v. *Lombard*, 9 How. 530, 551, and in *Ex parte Tobacco Board of Trade*, 222 U.S. 578, it was announced, in a *per curiam* opinion, as a subject no longer open to discussion, that one who is not a party to a record and judgment is not entitled to appeal therefrom," and that a refusal after decree to permit new parties to a record cannot be reviewed by this court directly on appeal, or indirectly, by writ of mandamus, under circumstances such as were there and are here presented. *Id.* at 402.

Accord, South Carolina v. *Wesley, supra*, 155 U.S. 542.

The law prohibiting appeals by non-parties applies equally to the United States when its agencies have not appealed. In *Commanding Officer U.S. Army Base* v. *United States*, 207 F. 2d 499 (6th Cir. 1953), an alien successfully prosecuted a habeas corpus action against his base commander for unlawful induction. The base commander took no appeal, but the United States did. Even though the court recognized the United States to be the real party in interest, and even though the inductee had entered stipulations with the United States extending the time for filing its brief, the Circuit Court of Appeals held:

> United States of America, not being a party against whom the judgment ran, and not having intervened in the proceedings below for making itself such a party, was not authorized to take an appeal from the judgment of the District Court, and such attempted appeal was of no validity. *Id.* at 501.

Similarly in *United States* v. *Seigel*, *supra*, the Administrator of the Office of Price Administration instituted an

action from which, when dismissed, he failed to appeal. The United States, describing itself in the court's words as "the real party in interest," but without seeking to be substituted as a party, filed a notice of appeal. The Circuit Court recognized the clear interest of the United States, but nevertheless held that it had not become a party to the judgment below and therefore could not appeal from the judgment. It explained the need for orderliness of judicial administration with reasons which apply to all attempted appeals by non-parties, whether they are lodged in the name of the non-party, as in *Seigel*, or are lodged on behalf of a non-party but in the name of a party, as in the present case:

> A person who has not submitted himself to the jurisdiction of a court, and who has not presented to the court his claim of interest in the controversy, ought not to be allowed to appeal from the judgment. The slightest regard for an orderly adjudication of contesting rights dictates that conclusion. The Supreme Court, in the cases we have cited, thought this matter important. Rules of procedure such as the one here pertinent are not mere naked technicalities. As we recently had occasion to observe, reasonable adherence to clear, reasonable and known rules of procedure is essential to the administration of justice. Justice cannot be administered in chaos. Moreover, the administration of justice involves not only meticulous disposition of the conflicts in one particular case but the expeditious disposition of hundreds of cases. If the courts must stop to inquire where substantial justice on the merits lies every time a litigant refuses or fails to abide the reasonable and known rules of procedure, there will be no administration of justice. Litigants must be required to cooperate in the efficient disposition of their cases. *Id.* at 146.

Authority in the Attorney General to take this appeal in the name but over the objections of the state agency parties — in reality on behalf of the state — cannot be implied from an examination of the practice in the state courts of Massachusetts.[4] Such an argument was made and rejected in *Louisiana* v. *Jack*, *supra*:

> This claim cannot be seriously entertained in the face of the long-time perfectly settled law that equity suits in

[4] *Secretary of Administration and Finance* v. *Attorney General*, 1975 Mass. Adv. Sh. 665 (March 20, 1975), 326 N.E. 2d 334, cannot control the federal rights created by 28 U.S.C. §§ 1253 and 1654. Nor is it relevant to this case since it involved a construction of that portion of the state statute, Mass. Gen. Laws c. 12, § 3 (text set forth in full at the end of this footnote), as it applied to the Attorney General's representation of a state agency in a *state* court. That portion of the state statute which allows the Attorney General to represent the state and state officials in "any other tribunal" was not in issue before the Massachusetts Supreme Judicial Court.

Finally, even if this ruling of the Massachusetts court was considered to be directory to the Supreme Court governing federal appeals, the procedure clearly outlined by the Massachusetts court to avoid "frustrating the will of the 'supreme executive magistrate'" has not been followed. The Massachusetts court stated that:

> We note that, where there is a policy disagreement between the Attorney General and the Governor or his designee, the appropriate procedure would be for the Attorney General to appoint a special assistant to represent the Governor's interests. It is only where the Attorney General believes that there is no merit to the appeal, or where the interests of a consistent legal policy for the Commonwealth are at stake, that the Attorney General should refuse representation at all. *Id.* at 680, n. 8.

In this case, as the stipulation (Appendix B) indicates, the Attorney General has refused the request of the Governor and the parties to appoint special counsel and has not met with the parties to discuss this request. *Infra*, pp. 3a, 4a and 5a.

Mass. Gen. Laws c. 12, § 3, provides:

> The attorney general shall appear for the commonwealth and for state departments, officers and commissions in all suits and other civil

> Federal courts and the appellate procedure in them are regulated exclusively by Federal statutes and decisions, unaffected by statutes of the states. *Id.* at 403.

See also, *Cord* v. *Smith*, 338 F. 2d 516 (9th Cir. 1964), in which the court disqualified an attorney from representing a party in a diversity action and declined to follow state decisional authority to the effect that an attorney could represent a party under the circumstances presented:

> It is quite true that in this diversity action involving a contract presumably made and to be performed in California, the substantive law of California controls. But we do not think that the rule of *Erie Railroad Co.* v. *Tompkins* . . . compels the federal courts to permit, in proceedings before those courts, whatever action by an attorney-at-law may be sanctioned by the courts of the state. When an attorney appears before a federal court, he is acting as an officer of that court, and it is that court which must judge his conduct. *Id.* at 524.

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proceedings in which the commonwealth is a party or interested, or in which the official acts and doings of said departments, officers and commissions are called in question, in all the courts of the commonwealth, except upon criminal recognizances and bail bonds, and in such suits and proceedings before any other tribunal, including the prosecution of claims of the commonwealth against the United States, when requested by the governor or by the general court or either branch thereof. All such suits and proceedings shall be prosecuted or defended by him or under his direction. Writs, summonses or other processes served upon such officers shall be forthwith transmitted by them to him. All legal services required by such departments, officers, commissions and commissioners of pilots for district one in matters relating to their official duties shall, except as otherwise provided, be rendered by the attorney general or under his direction.

As was the case in *Louisiana* v. *Jack*, *supra*, and *Brown* v. *Grand Trunk Western R. Co.*, *supra*, the Attorney General of Massachusetts apparently disagrees with the decision of the state agency parties not to appeal this case.[5] But he may not bypass the requirement that appeals only be taken by parties by utilizing the device of an unauthorized appeal in the name of the parties but in fact on behalf of the state itself.

Conclusion.

Amicus curiae respectfully urges this Court to dismiss the appeal for want of jurisdiction under 28 U.S.C. § 1253 and for noncompliance with Rule 10.

Respectfully submitted,

DANIEL A. TAYLOR,
Chief Legal Counsel to the Governor,
RODERICK L. IRELAND,
General Counsel,
Executive Office of Administration
and Finance,
Room 265, State House,
Boston, Massachusetts 02133.
(617) 727-2065
Attorneys for Amicus Curiae.

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[5] The Commonwealth of Massachusetts was an original party defendant to the proceeding below. But upon motion of the Attorney General the complaint was dismissed with respect to the state. *See*, Jurisdictional Statement, p. 6.

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Appendix A.

In the Supreme Court of the United States.

OCTOBER TERM, 1976.

No. 76-265.

THE COMMONWEALTH OF MASSACHUSETTS ET AL.,
APPELLANTS,

v.

HELEN B. FEENEY,
APPELLEE.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS.

Consent to Filing of Amicus Curiae Brief.

We hereby consent, pursuant to Rule 42 of the Supreme Court Rules, that the *amicus curiae* brief of John R. Buckley, Secretary of Administration and Finance of the Commonwealth of Massachusetts, may be filed in this proceeding with the Supreme Court of the United States.

Appellants

/s/ WALLACE H. KOUNTZE,
Personnel Administrator.

/s/ AMELIA MICLETTE,
CHAIRMAN,
Civil Service Commission.

Appellee

/s/ RICHARD P. WARD,
ROPES & GRAY,
225 Franklin Street,
Boston, Massachusetts 02110.

/s/ JOHN REINSTEIN,
Massachusetts Civil Liberties
Union Foundation,
68 Devonshire Street,
Boston, Massachusetts 02109.

Attorneys for Appellee.

Appendix B.

United States District Court
District of Massachusetts

HELEN B. FEENEY,
PLAINTIFF

v.

THE COMMONWEALTH OF MASSACHUSETTS ET AL.,
DEFENDANTS

CIVIL ACTION
No. 75-1991-T

Stipulation.

The parties in this action stipulate and agree to the following facts, without conceding the materiality or relevance thereof:

1. Wallace H. Kountze is the Personnel Administrator of the Division of Personnel Administration of the Commonwealth and a defendant in this action.

2. In his official capacity as Personnel Administrator of the Commonwealth, a defendant in this action and individually, Mr. Kountze has not authorized and opposes an appeal from the judgment of this Court to the United States Supreme Court.

3. In his official capacity as Personnel Administrator of the Commonwealth, a defendant in this action and individually, Mr. Kountze has not authorized and opposes the filing on his behalf by the Attorney General of the Notice of Appeal, the Motion for Stay of Judgment, the Motion for Relief from Judgment and the Supplementary Motion for Relief from Judgment now pending before the Court.

4. After reviewing the judgment and order of this Court entered on March 29, 1976, Mr. Kountze wrote to the Attorney General on March 31, 1976, requesting that no appeal be filed on his behalf. (A true copy of that letter is attached hereto as Exhibit A.) He has stated in an affidavit previously filed with this Court that he did not request a filing of the motion for a stay and the motion for relief from judgment.

5. Mr. Kountze was not consulted by the Attorney General prior to the filing of the documents referred to in paragraph 3, above, nor was Mr. Kountze at any time consulted by the Attorney General concerning the effect that the granting or denial of any of these motions would have on the administration of the civil service system of the Commonwealth. Counsel for the Division of Public Administration has consulted with the office of the Attorney General on these matters and has informed that office that the granting of these motions would cause some difficulty in the administration of the civil service system.

6. In a letter dated May 27, 1976 from Amelia Miclette, Chairperson of the Civil Service Commission to the Attorney General, the Attorney General was asked to appoint a Special Assistant Attorney General to represent Mr. Kountze and the members of the Civil Service Commission in all further proceedings in this action. (A true copy of this letter is attached hereto as Exhibit B.)

7. The Attorney General has not met with Mr. Kountze personally to discuss his opposition to a stay and to an appeal,

or his reasons therefor, or to discuss his request that his interests be represented by a Special Assistant Attorney General.

8. Given the Attorney General's filing of the Notice of Appeal and the motions described in paragraph 3 over Mr. Kountze's objection, Mr. Kountze wishes to be represented by a Special Assistant Attorney General in all further proceedings in this action.

9. The individual members of the Civil Service Commission in their official capacities as members of the Commission and as they collectively comprise the Commission are defendants in this action.

10. The members of the Civil Service Commission in their official capacities, as they comprise the Commission, and as defendants in this action, have not authorized and oppose an appeal from the judgment of this court to the United States Supreme Court.

11. The members of the Civil Service Commission, in their official capacities, as they comprise the Commission, and as defendants in this action, have not authorized and oppose the filing on their behalf by the Attorney General of the Notice of Appeal, the Motion for Stay of Judgment, the Motion for Relief from Judgment and the Supplemental Motion for Relief from Judgment.

12. After reviewing the judgment and order of this Court entered on March 29, 1976, the Civil Service Commission voted on March 31, 1976 to request the Attorney General not to appeal on behalf of the Civil Service Commission and its individual members. The Attorney General was informed of this request by letter dated March 31, 1976 from Amelia L. Miclette, Chairperson of the Civil Service Commission. (A true copy of this letter is attached hereto as Exhibit C.)

13. None of the defendant members of the Civil Service Commission were personally consulted by the Attorney General after May 25, 1976 concerning any of the matters which are now pending before the Court.

14. As of June 21, 1976, the Attorney General had not met with the members of the Civil Service Commission to discuss their opposition to a stay and to an appeal, or their reasons therefor, or to discuss their request that their interests be represented by a Special Assistant Attorney General.

15. Given the Attorney General's filing of the Notice of Appeal and the motions described in paragraph 11 over their objection, the members of the Civil Service Commission wish to be represented by a Special Assistant Attorney General in all further proceedings in this action.

16. The documents, attached hereto, marked "A," "B," "C," and "D" are true copies of letters to the Attorney General from and on behalf of the defendants set forth therein.

17. The Governor of the Commonwealth of Massachusetts is Michael S. Dukakis. The Governor in his official capacity as the chief executive officer of the Commonwealth opposes the filing of an appeal from the judgment of the Court in this action and the motion for a stay and the various other motions filed by the Attorney General on behalf of the defendants who are officials of the executive branch of government of the Commonwealth. The basis for the Governor's opposition is that such actions are not in the interests of the defendants or the Commonwealth and its citizens or otherwise in the public interest. The Governor has requested the Attorney General not to file an appeal on behalf of the defendants and, through his counsel, not to seek a stay, reconsideration or modification of the Court's judgment and order. On June 21, 1976, the Governor, through his counsel, requested the Attorney General to appoint a Special Assistant Attorney General to represent the defendants in all further proceedings in this action.

18. The list of persons constituting a list of eligible persons certified for appointment to the fire department of Boston has

since May 28, 1976 been supplemented by the names of additional eligibles. There is at least one woman who is eligible for appointment to the Boston Fire Department who has not yet been certified to the appointing authority but who in the opinion of Wallace H. Kountze, the Personnel Administrator will be at some time in the future certified for appointment.

19. In the opinion of Wallace H. Kountze, the Personnel Administrator for the Commonwealth, no confusion or difficulty in the administration of the Division of Personnel Administration of the Commonwealth has resulted from compliance with the Court's order heretofore entered in this action.

THE PLAINTIFF

By her attorney,

/s/ JOHN REINSTEIN
68 Devonshire Street
Boston, Massachusetts 02109

THE DEFENDANTS

By Francis X. Bellotti,
Attorney General

/s/ THOMAS R. KILEY
Assistant Attorney General
One Ashburton Place
Boston, Massachusetts 02108

June 21, 1976

Exhibit "A."

The Commonwealth of Massachusetts

EXECUTIVE OFFICE FOR ADMINISTRATION AND FINANCE
One Ashburton Place, Boston 02108

March 31, 1976

Honorable Francis X. Bellotti
Attorney General
Room 373
State House
Boston, Massachusetts 02133

Dear Attorney General Bellotti:

As the Personnel Administrator of the Commonwealth, the statutory successor to the Director of Civil Service (c. 835 of the Acts of 1974), I have read the opinion and order in the Veterans' Preference cases (*Anthony* v. *Commonwealth*; *Feeney* v. *Commonwealth*) and it is my opinion that the matter should not be appealed to the Supreme Court of the United States. Accordingly, I request that you, as my legal representative pursuant to M. G. L. c. 12 s. 3, not file an appeal on my behalf.

Sincerely,

/s/ WALLACE H. KOUNTZE
Personnel Administrator.

Exhibit "B."

The Commonwealth of Massachusetts

EXECUTIVE OFFICE FOR ADMINISTRATION AND FINANCE
One Ashburton Place, Boston, Ma. 02108

May 27, 1976

Attorney General Francis X. Bellotti
Office of the Attorney General
20th Floor, One Ashburton Pl.
Boston, Mass. 02108

Re: Helen B. Feeney, Plaintiff
v.
The Commonwealth of Massachusetts, Et Al, Defendants

Dear General Bellotti:

I write you on behalf of the members of the Civil Service Commission and the Administrator of the Division of Personnel Administration, Wallace H. Kountze, all defendants in the above captioned matter.

We have been advised that your office has undertaken steps to seek a stay of judgment in this case in the United States District Court for the District of Massachusetts as well as to appeal the matter to the United States Supreme Court. While we recognize your legal right to take these actions, we nevertheless remain opposed to both the stay and the appeal. Therefore, we strongly believe that we are in need of legal

counsel to represent our interests and a formal request is hereby made for the appointment of a Special Assistant Attorney General to act as our Counsel in these proceedings.

The matter is of such grave concern and importance to us, and our need for counsel is so pressing, that we seek the opportunity to meet with you as soon as possible to discuss the ramifications of our position.

We await hearing from you in this regard at the earliest possible time.

Very truly yours,

/s/ AMELIA L. MICLETTE,
CHAIRPERSON,
Civil Service Commission

CC: Wallace H. Kountze, Personnel Administrator

Exhibit "C."

The Commonwealth of Massachusetts.

EXECUTIVE OFFICE FOR ADMINISTRATION AND FINANCE
One Ashburton Place, Boston, Ma. 02108

March 31, 1976

Francis X. Bellotti
Attorney General
Office of the Attorney General
State House, Room 373
Boston, Massachusetts 02133

RE: Carol A. Anthony, et al.

v.

The Commonwealth of
Massachusetts, et al.

Helen B. Feeney

v.

The Commonwealth of
Massachusetts, et al.

Dear Attorney General Bellotti:

At its meeting of March 31, 1976, the Civil Service Commission voted that:

1) The Commission recognizes and appreciates the interest of individual veterans, their associations, and their representatives in having the above named decision appealed to a higher court. However, the Commission is unwilling to be a party to such an appeal.
2) The Commission believes that the most appropriate course of action at the present time is for the legislature to enact an alternative procedure to provide preference for veterans along the line spelled out in the decision of the federal court.
3) Accordingly, the Commission requests the Attorney General that no appeal be made in this matter in the name of the Civil Service Commission and its individual members.

Should you decide to pursue further the matter of the appeal, the Commission would respectfully request the opportunity to meet with you in order to share its view in this regard.

Sincerely,

/s/ AMELIA L. MICLETTE,
CHAIRPERSON,
Civil Service Commission

CC: Secretary John R. Buckley

Wallace H. Kountze
Personnel Administrator

Exhibit "D."

The Commonwealth of Massachusetts

EXECUTIVE OFFICE FOR ADMINISTRATION AND FINANCE
State House, Boston 02133

March 31, 1976

The Honorable Francis X. Bellotti
Attorney General of the Commonwealth
John W. McCormack Building
One Ashburton Place
Boston, Massachusetts 02108

Dear Attorney General Bellotti:

I have reviewed the opinion and order of the Court in the cases of *Anthony et al* v. *Commonwealth of Massachusetts et al* (CA 74-5061-T) and *Feeney* v. *Commonwealth of Massachusetts et al* (CA 75-1991-T), the so-called Veterans' Preference cases, and have concluded that the matter does not merit further judicial review. Accordingly, I would support the requests of both the Personnel Administrator and the Civil Service Commission, forwarded to you herewith, that you not appeal this case to the Supreme Court of the United States.

I am aware that the decision to enjoin utilization of Veterans' Preference has an impact on the state's personnel system which I have the ultimate responsibility of overseeing. The delay and uncertainty caused by an appeal might well

complicate administration of that system. Accordingly, my office has already begun to work with the Legislature to formulate legislation which would further the legitimate governmental interest of rewarding veterans while not working to the permanent and absolute disadvantage of the women of the Commonwealth.

Sincerely yours,

/s/ JOHN R. BUCKLEY, SECRETARY

Appendix C.

The Commonwealth of Massachusetts

EXECUTIVE OFFICE FOR ADMINISTRATION AND FINANCE
One Ashburton Place, Boston 02108

September 1, 1976

Michael Rodak, Jr., Esquire
Clerk of the United States Supreme Court
Washington, D.C. 20543

Re: Commonwealth of Massachusetts et al v.
Helen B. Feeney, October Term, 1976,
No. 76,265

Dear Sir:

We are named as the only two parties appellant in the above appeal, notice of which was filed on May 25, 1976, by the Attorney General of Massachusetts. We wish to bring to the Court's attention that while this appeal has been filed on our behalf as the sole parties appellant, the appeal is without our authorization. (At an earlier stage of the proceedings the state of Massachusetts and the Division of Civil Service were parties defendant, but at the request of the Attorney General such parties were dropped and judgment entered in their favor by order of the three judge panel on March 29, 1976.)

On March 31, 1976, each of us informed the Attorney General of our request that this matter not be appealed. On May

27, 1976 we reiterated our desire that no appeal be taken. All of these letters are appended to a Stipulation (copy enclosed), dated June 21, 1976, filed with the United States District Court, District of Massachusetts in the matter appealed from, Civil Action No. 75-1991-T.

Said appeal was nevertheless filed and perfected with the filing of a jurisdictional statement on August 23, 1976, all without our consent and contrary to our express requests.

Therefore, pursuant to 28 USC Section 1654, and acting in our own behalf as all of the parties appellant to this appeal, we request that the Court dismiss the appeal.

Respectfully submitted,

WALLACE H. KOUNTZE
Personnel Administrator

AMELIA MICLETTE,
CHAIRMAN
Civil Service Commission

cc: Michael S. Dukakis
Governor
Francis X. Bellotti
Attorney General
John R. Buckley
Secretary of Administration & Finance
Richard P. Ward
Counsel to Plaintiff-Appellee